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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1896.

VOLUME XLVII.

D. A. CAMPBELL,

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Rec. Sept. 28, 1896.

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OF

NEBRASKA.

1896.

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(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

See page xlv for table of Nebraska cases overruled.

The syllabus in each case was prepared by the judge or commissioner writing the opinion.

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page li.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, }
HON. T. L. NORVAL, } JUDGES.

HON. ROBERT RYAN, }
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

STATE INSURANCE COMPANY OF DES MOINES,
IOWA, V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

FILED FEBRUARY 4, 1896. No. 7641.

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1. **Record for Review: BILL OF EXCEPTIONS: STIPULATIONS.**
A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions.
2. ———: ———: ———. Nor can such stipulation make a part of the record in which the same is filed the bill of exceptions settled and allowed in another cause.
3. **Absence of Question for Review: AFFIRMANCE.** Where the petition in error presents no question for review, the judgment of the trial court will be affirmed.

ERROR from the district court of Lancaster county. Tried below before HALL, J. Heard on motion of defendant in error to affirm the judgment of the trial court. *Motion sustained.*

Charles O. Whedon, for the motion.

Jacob Fawcett, contra.

PER CURIAM.

This cause was submitted on the motion of the defendant in error to affirm the judgment of the trial court. We have held, where an examination of the record of a cause brought to this court for review discloses that the petition in error presents no question for consideration on a motion to dismiss the proceedings, the cause will be considered on its merits, and the judgment affirmed. (*Upton v. Cady*, 38 Neb., 209; *Erck v. Omaha Nat. Bank*, 43 Neb., 613.) The rule stated above is a salutary one, and its enforcement will tend to discourage the bringing of cases to this court for delay merely.

The petition in error herein contained forty-eight assignments, of which four question the sufficiency of the evidence to support the verdict; three attack the rulings of the court upon the admission of testimony; two relate to challenges of jurors; twenty-seven are predicated upon the giving and refusing of that number of instructions, while but one instruction is copied into the transcript; six are based upon submitting to the jury special findings from 1 to 6 inclusive, and no such findings have been certified up; one that the verdict is contrary to the fifteenth instruction, no such instruction being in the record; and one that

the court erred in overruling the motion for a new trial. Of course we must disregard the assignments which are foreign to the record, and it is obvious that not one of the other errors assigned can be considered without reference to a bill of exceptions containing the evidence adduced on the trial in the court below and preserving the rulings complained of and the exceptions thereto. The important inquiry is whether there is any bill of exceptions in this case. In the transcript brought here we find the following stipulation of the parties:

"In the District Court of Lancaster County, State of Nebraska.

"THE BUCKSTAFF BROTHERS MANUFACTURING COMPANY	}	Stipulation.
V.		
STATE INSURANCE COMPANY OF DES MOINES.		

"It is hereby stipulated and agreed that this case be submitted to the jury now in the box in the case of the Buckstaff Brothers Manufacturing Company *versus* the American Fire Insurance Company of New York, upon the record already made in the said case; the jury to consider all of the oral testimony and exhibits admitted in said case. All of the exhibits admitted or offered in said case are to be taken and considered as applicable to this case; all of the testimony offered, whether oral or written and excluded by the court, shall be considered as offered in this case; and all of the rulings of the court during the trial of said American Fire Insurance Company's case shall be considered as having been made in this case, and all of the exceptions to said testimony and said rulings shall be considered as in this

case; the intention being that this case, when submitted, shall be upon the same record in all respects, with the same rights and exceptions to both parties as in said case of Buckstaff Brothers Manufacturing Company *versus* the American Fire Insurance Company of New York. It is understood that the defendant makes no defense by reason of insufficiency of proofs of loss, and no further testimony is to be introduced in this case, excepting only the insurance policy sued on. This case is to be submitted upon the instructions of the court to be given to the jury, and it is understood that the instructions asked for by both parties in said American Fire Insurance Company case shall be considered as asked for by the respective parties in this case.

“BUCKSTAFF BROTHERS MANUFACTURING COMPANY,

“By CHAS. O. WHEDON, *Its Attorney*.

“STATE INSURANCE COMPANY,

“By J. FAWCETT, *Its Attorney*.”

It appears that a bill of exceptions was settled and allowed in the case mentioned in the foregoing stipulation, and it is argued that the same should be treated and considered as a part of the record in the case at bar. Clearly there is nothing in the above stipulation which will justify such a conclusion, although such may have been the intention of the parties when they entered into the same. It was contemplated that other and additional testimony should be adduced in this case than was given in the case of the American Fire Insurance Company, namely, the policy herein declared upon. A proper bill of exceptions in that case, therefore, would not include all the evidence in the case at bar. There is no order of

court making any portion of the record in the case to which reference has been made a part of the record herein. If the bill of exceptions of what transpired in such other action is to be considered a part of this record, it is such solely by reason of the stipulation alluded to, since it is not entitled in this suit, nor was it signed and allowed herein. If such stipulation is not itself properly a part of this record, then it is plain that it cannot be considered by us for any purpose whatever. The bill of exceptions in one cause cannot properly preserve and bring into the record what transpired in another suit between different parties, so that we could not expect to find in the bill of exceptions in the case of the American Fire Insurance Company the evidence adduced and rulings made during the trial in this cause. It is true the written stipulation provides that this case should be submitted to and decided by the court below upon the same record as to the rulings of the court and upon the same testimony as in the other case, save only the policy in suit; but there is nothing to show that this agreement was acted upon by the litigants and the court. On the contrary, the record affirmatively shows that the cause was submitted to the jury impaneled in the other case by "agreement in open court," from which the inference may be indulged that the written stipulation was ignored by the parties, and not considered by the court. The steps requisite to preserve the evidence upon which the jury found their verdict and the rulings of the court during the trial have not been taken. This could be accomplished only by a bill of exceptions duly settled in the mode required by statute. A stipulation of the attorneys in a cause is no more part of the record than

a deposition or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the record cannot be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof cannot take the place of a bill of exceptions. (*Credit Foncier of America v. Rogers*, 8 Neb., 34; *State v. Knapp*, 8 Neb., 436; *Herbison v. Taylor*, 29 Neb., 217; *McCarn v. Cooley*, 30 Neb., 552.) This stipulation could have been brought into the record by a bill of exceptions; but that not having been done, it is not properly before the court, and hence it cannot be considered.

It is said, in argument, the stipulation was entered into "to relieve the court, counsel and clients, and the interested public, of the repetition of an endless amount of time, labor, and expense." The motive was indeed a laudable one, and it is to be regretted that the failure to make the stipulation a part of the record prevents us from determining whether the judgment was right or wrong. The court, however, is not to blame, since this question of practice had already been settled by repeated decisions. Nor was it necessary, under the views herein expressed, as counsel suppose, that the ponderous and voluminous bill of exceptions in the case of the American Fire Insurance Company should be duplicated at an enormous and needless expense, in order to have preserved the rights of the parties. No reason occurs to us why it might not have been brought into this record, without copying, by settling of a brief bill of exceptions herein making it a part thereof by referring to, and identifying, the same in such a manner that there could possibly be no mistake as to what is referred to. Even if this were not so,

yet the matter of labor and expense involved in duplicating the bill of exceptions is no reason why we should consider as parts of this record the stipulation set out above and the bill of exceptions in another cause, when they have not been made so in the mode prescribed by statute. Inasmuch as no bill of exceptions has been allowed in this case, the errors relied upon for a reversal cannot be reviewed, and the motion to affirm the judgment must be sustained.

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V.
RICHARD HOGEBOOM ET AL., IMPLAINED
WITH CHARLES F. TUTTLE, APPELLANT.

47	7
50	617
51	688

FILED FEBRUARY 4, 1896. No. 8026.

Appeal: RECORD FOR REVIEW: LACHES. The record of the trial court in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy is by appropriate proceeding to secure a correction thereof in the lower court.

MOTION by appellee to dismiss appeal from a decree of the district court of Sarpy county on the ground that it was not taken in time. *Motion sustained.*

F. A. Brogan, for the motion.

Charles F. Tuttle, contra.

POST, C. J.

This is a motion by the Omaha Loan & Trust Company, the appellee, to dismiss the appeal on

the ground that it was not taken within the prescribed period of six months after the date of the final decree. Two transcripts have been filed in this court, both showing a decree rendered March 27, 1895, but differing in this: that one, viz., that filed by the appellant, is accompanied by a caption in which appears the following recital: "And afterward, on the 2d day of April, 1895, there was filed in the office of the clerk of the district court a decree, and the same became of record in journal 'F,' page 603, in words and figures following."

It is contended by appellant that the necessary and only inference from the foregoing recital is that the decree was not in fact entered until April 2, and that, following *Bickel v. Dutcher*, 35 Neb., 761, and *Ward v. Urmson*, 40 Neb., 695, the appeal taken October 1, following, was within the statutory time. The statement of the caption regarding the date of the filing of the decree does not purport to be a part of the record of the district court, but is a mere recital superadded by the clerk, and indicating, if it is to be regarded for any purpose, that the draft of the decree previously rendered and entered of record was, on the day named, lodged in the clerk's office and placed with the files of the court. It was said in *Bickel v. Dutcher* that the time for appeal begins to run against the appellant whenever it is within his power to comply with the statute regulating appeals by procuring a transcript of the proceedings of the district court; but in neither of the cases cited was it intimated that this court would look outside of the record of the trial court for the date of the order or decree appealed from. It is true that affidavits were received, but without objection, in *Bickel v. Dutcher*, tending to prove that the

Ryan v. Douglas County.

decree was rendered on a day other than that shown by the record. They were not, however, seriously urged or considered for the purpose of contradicting the record of the district court, and the decision in that case, as shown by the opinion, rests upon entirely different grounds. In *State v. Hopewell*, 35 Neb., 822, it was held that the record of the trial court is, on appeal to this court, conclusive evidence of the date of the order or decree appealed from; and if the record is incorrect, the remedy is by direct proceeding to secure a correction thereof in that court. Like views are expressed also in *Haggerty v. Walker*, 21 Neb., 596, *Worley v. Shong*, 35 Neb., 311, and *McAllister v. State*, 81 Ind., 256. The rule recognized in the cases cited is without doubt applicable to the case at bar. It follows that the appeal was not taken within the statutory time, and that the motion to dismiss must be sustained.

MOTION TO DISMISS SUSTAINED.

RYAN & WALSH V. DOUGLAS COUNTY, IMPLEADED
WITH COWIN & MCHUGH ET AL., APPELLANTS,
AND NATIONAL BANK OF COMMERCE, AP-
PELLEE.

FILED FEBRUARY 4, 1896. No. 5759.

1. **Contracts: DEFINITION OF "DUE."** The term "due" is employed to express distinct ideas. In some connections it is held to mean a debt immediately payable. In others it signifies a state of indebtedness merely, without reference to the time of payment; but does not include contingent liabilities which may ripen into absolute indebtedness upon the future performance of contract obligations.

47	9
55	338

2. **Construction of Assignment of Interests Due Contractors for County Building: ATTORNEYS' LIENS.** R. & W., being engaged as contractors in the construction of a public building for D. county, executed an assignment as follows: "To the Board of County Commissioners: For value received we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said warrants or vouchers in our name, and to pay all warrants or vouchers to the Bank of Commerce." *Held*, Not to include money subsequently earned by R. & W. in the performance of their contract with the county.

APPEAL from the district court of Douglas county. Heard below before SCOTT, J.

Cowin & McHugh, J. J. O'Connor, and Brome, Andrews & Sheean, for appellants.

E. J. Cornish, contra.

POST, C. J.

In the year 1887 the firm of Ryan & Walsh, by written contract, undertook the erection, for Douglas county, of a building described as a county hospital, the stipulated price therefor being \$120,033. Soon after the commencement of the work, a controversy arose between the contractors and the county, involving the construction of the plans and specifications for said building. During the progress of the work difficulties multiplied so that Ryan & Walsh, in order to protect themselves in their disputes with the county, consulted Hon. John C. Cowin of the Omaha bar, upon whose advice they appear to have acted until some time in the year 1888. In the year last named Mr. Cowin associated with himself Mr. W. D. McHugh, in the firm name of Cowin & McHugh, and thereafter said firm repre-

sented Ryan & Walsh in said controversy. On the completion of the building in the month of February, 1890, Ryan & Walsh, under the advice of Cowin & McHugh, presented a bill for \$69,404.09, being the amount of the balance claimed by them, and which included the sum of \$50,612.09 for extra work and material done and furnished at the special instance and request of the county. The county board, after a protracted investigation, made an order allowing the sum of \$17,951.57 in full of said demand, and from which an appeal was by the claimants taken to the district court for Douglas county. Ryan & Walsh, in the meantime being pressed for funds with which to carry on their work and to meet their obligations incurred for material, gave numerous written orders upon the county directing payment out of money earned by them under said contract. Among the orders thus given was one in favor of the Bank of Commerce, as follows:

“OMAHA, 2—9, 1889.

“To the Board of County Commissioners of Douglas County: For value received we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said vouchers or warrants in our name, and to pay all warrants or vouchers to the Bank of Commerce.

“WALSH & RYAN.

“DENNIS CUNNINGHAM.

“JERRY RYAN.”

It was deemed advisable by the bank, in order to protect its rights under the foregoing assignment, to join in the appeal of Ryan & Walsh, and the necessary bond and notice were accordingly given by it. Issue being

joined in the district court, a trial was had therein at the February, 1891, term, resulting in a verdict and judgment for Ryan & Walsh in the sum of \$37,571.20. On the 27th day of February, 1891, Cowin & McHugh filed notice of an attorney's lien upon said judgment in the sum of \$4,000, being a general balance claimed for their services in said cause. On the 20th day of November, 1891, they filed a second notice, in which they claimed a further lien in the sum of \$1,000, being \$150 for money advanced in the prosecution of said cause, and \$850 for services rendered since the date of the lien first mentioned; and on the 27th day of June, 1891, J. J. O'Connor gave written notice of an attorney's lien in said cause on account of services rendered Ryan & Walsh, in the sum of \$5,000. The situation was further complicated by suits of creditors, other than those above named, to enforce payment on account of the orders or partial assignments held by them in which the county had been enjoined from paying, and Ryan & Walsh from receiving, any part of the money adjudged due the latter. In view of the many conflicting claims, Ryan & Walsh, who were then insolvent, on the 20th day of November, 1891, by their attorneys, Cowin & McHugh, instituted proceedings in the nature of a bill of interpleader to which the county and the several claimants of the fund in dispute, eighteen in number, were made parties. Upon the issues joined by the answers of the defendants named in said proceeding there was a final decree determining the rights of the parties in the premises, but which at this time concerns us only so far as it relates to the claims of Cowin & McHugh, O'Connor, and the Bank of Commerce. The

answer of the bank is unfortunately not found in the record, but, judging from the decree of the district court, its contention therein was that the effect of the order or assignment above set out was to create in its favor a first lien for advancements made, *and to be made*, to Ryan & Walsh of all money then due, or to be thereafter earned by them under their contract with the county. In that view the court evidently concurred, since it is in the third finding recited:

“That on said 19th day of February, 1889, the said plaintiffs sold, assigned, transferred, and set over to the said Bank of Commerce, by an instrument in writing bearing that date, all their right, title, and interest in and to all moneys, warrants, or vouchers due or to become due to the said plaintiffs from the said county of Douglas under and by virtue of said contract between said plaintiff and said county of Douglas, and authorized the said Bank of Commerce to receipt for all vouchers or warrants in the name of said plaintiffs, and instructed the defendant, the county of Douglas, to pay all warrants or vouchers due or to become due to said plaintiffs from said county of Douglas under said contract to the said Bank of Commerce, said instrument being intended between the parties as collateral security merely to the indebtedness then owing and which thereafter might be contracted by said plaintiffs with the said Bank of Commerce; that the board of county commissioners were duly notified of said order or assignment and the same was filed with the board of county commissioners of Douglas county on the 20th day of March, A. D. 1889.”

The indebtedness of Ryan & Walsh to the bank at that time approximated \$20,000, and there were

delivered to it by the county clerk, subsequent to the date of said assignment, five warrants drawn to Ryan & Walsh, aggregating \$17,946.93, and dated, respectively, February 20, March 16, May 20, July 20, and September 7, 1889. The bank also, according to the finding of the court relying upon said assignment, advanced to Ryan & Walsh the further sum of \$35,144.12, which was used by them in carrying on the work under their contract with the county, and which sum is now due and wholly unpaid. The court, upon the foregoing findings and evidence, ordered the amount due on the judgment against the county to be applied, first, in satisfaction of the indebtedness of Ryan & Walsh to the bank; second, that the balance should be distributed *pro rata* among the other assignees of said firm; and from which order and decree Cowin & McHugh and O'Connor have appealed to this court. •

The question first suggested on this appeal is the effect of the instrument, upon which the bank rests its claim, to the fund in controversy. That an order payable out of a particular fund operates as an equitable assignment thereof *pro tanto* is conceded by appellants; nor can it be doubted that an assignment of money to become due by the terms of an existing contract is valid and enforceable in equity. (*Field v. City of New York*, 6 N. Y., 179; *Derlin v. City of New York*, 63 N. Y., 15; *Ruple v. Bindley*, 91 Pa. St., 299; *Bates v. Richards Lumber Co.*, 57 N. W. Rep. [Minn.], 218; *Krapp v. Eldridge*, 33 Kan., 106.) But does the assignment in this instance, by its terms, include money subsequently earned by Ryan & Walsh in the prosecution of the work in which they were then engaged? We think not. Counsel for the bank, in

the brief submitted by them, refer to no authority in support of the conclusion of the district court, and our own investigation has been equally unproductive of that result. The cases examined, on the other hand, tend strongly to support the opposing view. The language of the assignment is "all our interest in warrants or vouchers due us from said county." The word "due," according to the consensus of judicial opinion, has a double meaning, viz., (1) that the debt or obligation to which it applies has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with "owing," and includes all debts, whether payable *in præsenti* or *in futuro*.

In *Allen v. Patterson*, 7 N. Y., 476, it was alleged that there was due from the defendant on account for goods sold and delivered the sum of \$371.01. On affirming an order overruling a demurrer to the complaint it was said: "Counsel insist that the statement that there was 'due,' etc., did not amount to a statement that the debt had become payable; that it meant no more than the statement that the defendant is 'indebted,' etc.; and that if the word 'due' had two significations, the plaintiff could not select between them and impute to it the one which suits his purpose best," and, after citing with approval the opinion of Judge Story in *United States v. State Bank of North Carolina*, 6 Pet. [U. S.], 29*, holding that the word "due" is used both to express the mere state of indebtedment and to indicate that the debt had in fact become payable, it was said: "In the latter sense I think the word 'due' was used by the pleader in the complaint."

District Township of Jasper v. District Township of Sheridan, 47 Ia., 183, was an action for the recovery of money as agreed between the parties, on the change of district boundaries, for the division of school funds due the first Monday in April. The fund in controversy was derived from taxes previously assessed, but which were payable at a later date. In disposing of the question the court say: "It is claimed by the defendant that a fund is due when the time arrives in which payment is enforceable, and it must be admitted that this is the ordinary meaning of the word; but while that is so, there is certainly another meaning somewhat broader."

In *Foster v. Singer*, 69 Wis., 392, the defendant was served with garnishee process in an action against Phillips, an employe, under a statute which authorized the appropriation by that means of debts "due or to become due" to the execution defendant. The garnishee summons was served August 28, and the controversy involved the salary of the defendant for that month, which, according to the evidence, was payable monthly at the end of each month. It was held that the salary for August was not on the day of the service "money due" within the meaning of the statute, since the defendant could not have maintained an action therefor against the garnishee. It was further held that it was not "money to become due," since the contract was an entirety, and to entitle Phillips, the defendant, to recover, it was necessary for him to work the entire month. In the opinion by Taylor, J., we find this language: "If Phillips had quit work on the 29th, he could not have recovered any part of his wages for the month. The debt, therefore, would only become

due upon the contingency that Phillips continued to work for the garnishee for the entire month."

In *Bishop v. Young*, 17 Wis., 46*, it was also sought to charge the defendant as garnishee; but his liability was shown to be contingent upon the completion by Grant, the attachment defendant, as contractor, of certain buildings then in course of construction. Grant, among other conditions, had stipulated to complete the buildings by a given date, and in case of his failure, to pay to Young damage at a given rate during the period of his default. In affirming the judgment below for the defendant it is said: "The 'property, moneys, and credits' here spoken of are such as are in the hands of the garnishee which belong to the principal debtor. And the 'debts due or to become due' evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon the performance of a contract by the defendant in attachment." (See, also, as supporting the views above expressed, *Scudder v. Coryell*, 5 Hals. [N. J.], 340; *Hoyt v. Hoyt*, 1 Harr. [N. J.], 138; *Looney v. Hughes*, 26 N. Y., 514; *Fowler v. Hoffman*, 31 Mich., 219.)

The rule distinctly recognized by the authorities is that the term "money due," etc., implies such an obligation as will, by the effluence of time alone, ripen into a cause of action, and in no reported case, we believe, have like expressions been held to include property having a potential existence only.

The reasoning in *Bishop v. Young* is quite as applicable to the case before us. Here the fund, which is the subject of the controversy, is the

product of the labor and skill of the contractors subsequent to the assignment relied upon, and had at the time in question no actual existence. Further liability of the county under the contract was conjectural merely and contingent upon the performance by Ryan & Walsh of their stipulated obligations. It was not, in any legal sense of the term, "money due;" and the assignment was accordingly ineffectual for the purpose of transferring the title thereof to the bank. It follows that the appellants, for the value of the services rendered by them for Ryan & Walsh in the matter of the claim against the county, are entitled to liens upon the judgment recovered which is enforceable in this proceeding. The bank, it should be noted, relied upon its alleged paramount title to the proceeds of the judgment without contesting seriously the value placed upon the appellants' services.

As to the claim of Cowin & McHugh, it is sufficient to say that their employment began in the year 1887, and that the foundation for the claim, afterward successfully prosecuted against the county, was laid by their construction of the plans and specifications, together with their advice during the progress of the work. The bills for extras, which were contested by the county on the ground that they were provided for by the contract, included 200 different items, requiring much time and labor in the preparation of the cause for trial. The trial which resulted in the judgment for Ryan & Walsh was begun February 10 and continued without interruption until March 3. Subsequently a bill of exceptions, consisting of 1,900 pages of type-written matter, was served upon Cowin & McHugh, which, after examination and approval

by them, was allowed by the presiding judge. The county, intending to have the judgment reviewed in this court, at once procured a transcript of the record of the district court to accompany its petition in error. However, about that time the county board, after argument by Cowin & McHugh, abandoned the proposed proceedings in error, and which determination was expressed by an appropriate resolution. Also, as illustrating the character and value of the services rendered by appellants, it may be mentioned that the motion for a new trial submitted by the county attorney contained 287 assignments, mostly relating to rulings during the course of the trial; and, as already appears, the amount recovered exceeds the allowance of the county board by more than \$20,000. None of the witnesses examined upon that subject, including Hon. T. J. Mahoney, who represented the county throughout the entire controversy, place the services of counsel for Ryan & Walsh at less than \$5,000, while the average estimate thereof greatly exceeds that sum. The claim of Cowin & McHugh cannot, upon the record before us, be said to be unreasonable. Indeed, a finding in their favor much greater than the amount of their claim would be warranted by the evidence.

The solution of the questions presented by O'Connor's claim is attended with more difficulty. It is, in the first place, not clear from the evidence whether his appearance in the district court was for Ryan & Walsh or Walsh alone. Previous to the alleged employment the members of the firm named, consisting of Jerry Ryan, Edward Walsh, and Dennis Cunningham, had become involved in controversies with each other, culminating in a

suit by Ryan against his copartners, in which O'Connor appeared as attorney for Walsh, and which resulted in an order restraining the latter from certain threatened acts in the name of the firm. According to the testimony of both Ryan and Cunningham, Cowin & McHugh were the only attorneys authorized to represent the said firm, and O'Connor's appearance in the district court was as the representative of Walsh individually; but, in the absence of record evidence to support that contention, the actual appearance of Mr. O'Connor in the name of the firm, and his active participation in the trial, of which the partners were all aware, raises a presumption of employment by the firm too strong to be thus overcome. That proceeding was prosecuted in the name and for the benefit of the firm, and the law implies a promise to pay the reasonable value of the service rendered by appellant therein. It is, however, as we have seen, conclusively shown by the record that Cowin & McHugh prepared the cause for trial and were responsible for its management during every stage of its progress to judgment. The office of O'Connor was that of an assistant only for the purpose of the trial, and \$1,000 will, it is believed, under the circumstances of the case, liberally compensate him for his services.

The decree of the district court will accordingly be reversed with directions to proceed in accordance with this opinion, or, should appellants elect within thirty days from this date, a final order will be entered here so modifying the decree as to allow the appellants Cowin & McHugh the sum of \$5,000, and interest from February 23, 1891, and to J. J. O'Connor \$1,000, with interest from the date last named, said amounts to be first liens

Baum Iron Co. v. Burg.

upon the fund in controversy and to prorate with each other.

REVERSED.

BAUM IRON COMPANY V. LOUIS BURG.

FILED FEBRUARY 4, 1896. No. 5855.

47	21
154	30
47	21
57	564

1. Examination of Witnesses: LEADING QUESTIONS: REVIEW.

The extent to which leading questions may be allowed rests in the discretion of the trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court.

2. Contracts: RESCISSION. A contract cannot be rescinded in part on account of fraud, and ratified in part. It is the duty of the injured party in such case to rescind the contract as a whole or not at all.

3. Review: HARMLESS ERROR. A judgment will not be reversed on account of error not prejudicial to the complaining party.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

The issues are stated in the opinion.

Kennedy & Learned, for plaintiff in error:

There was error in receiving in evidence the answers to leading questions. (*Swan v. Swan*, 15 Neb., 453; *Obernalte v. Edgar*, 28 Neb., 70; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 357.)

In criticising the instructions reference was made to the following cases: *McDowell v. Thomas*, 4 Neb., 542; *Harrow Spring Co. v. Whipple Harrow Co.*, 51 N. W. Rep. [Mich], 197; *Cockburn v. Ashland Lumber Co.*, 12 N. W. Rep. [Wis], 49; *Winans v.*

Sierra Lumber Co., 4 Pac. Rep. [Cal.], 952; *Halstead Lumber Co. v. Sutton*, 26 Pac. Rep. [Kan.], 444; *Trigg v. Clay*, 13 S. E. Rep. [Va.], 434; *Appeal of Brush Electric Co.*, 11 Atl. Rep. [Pa.], 654; *Imperial Coal & Coke Co. v. Port Royal Coal & Coke Co.*, 20 Atl. Rep. [Pa.], 937.

Bartlett, Baldrige & De Bord, contra.

POST, C. J.

This was an action by the defendant in error Louis Burg, doing business as the L. Burg Manufacturing Company, against the plaintiff in error, the Baum Iron Company, in the district court for Douglas county. The cause of action alleged is a quantity of hickory axles, amounting, at the contract price, to \$282.87; also, certain double-trees and wagon-hounds, amounting to \$4.25, making a total demand of \$287.12. It is alleged that as one of the conditions of the contract with respect to the said property it was mutually agreed that it should be examined and accepted on behalf of the defendant below by one Hatrick at Farmington, Iowa, at which point it was to be delivered on the cars billed to the defendant at Omaha, in this state, and that his selection should be final and binding upon the parties. It is further alleged that the property above described was selected by said Hatrick pursuant to said agreement and shipped to the defendant below, by whom it was received June 10, 1890. The allegations of the petition are denied by the answer, accompanied by a counter-claim in which it is charged that the plaintiff below agreed to furnish to the defendant therein at Farmington, Iowa, certain wagon timbers of substantially the character described in

the petition, to be strictly No. 1 in quality and sound in every particular; that the plaintiff, in order to cheat and defraud the defendant, falsely and fraudulently represented said Hatrick, a resident of Farmington and a stranger to the plaintiff, to be a capable and impartial person to select such material in its.(defendant's) behalf; that he, Hatrick, was not impartial, but, on the contrary, immediately conspired with the plaintiff to cheat and defraud the defendant by the selection of unsound material, and that in pursuance thereof, said conspirators selected and shipped to the defendant material corresponding in size to that purchased, but which was unsound and worm-eaten, by reason of which it was wholly unfit for use, and of no value whatever; that on discovering the fraud so practiced upon it, the defendant notified the plaintiff that it held said material subject to his (plaintiff's) order and subject to freight charges paid thereon, and that upon the plaintiff's refusal to remove said material it was sold on his account by the defendant for the sum of \$232.65, and which, less the sum of \$101.84, charges for freight, drayage, and cost of handling, has been applied upon the demand against the plaintiff hereafter mentioned; that the material so contracted for was necessary for the use of the defendant in its business, and by reason of the plaintiff's default it has been damaged in the sum of \$240. There is a further counter-claim for \$95.75 on account of material which, as alleged, the plaintiff has failed to deliver in accordance with his agreement to that effect. There is also a prayer for judgment for the amounts above named less \$130.81, the net proceeds of the material sold on plaintiff's account. The reply is in effect a

general denial. A trial was had, resulting in a verdict and judgment for the plaintiff therein for \$332.62, and which has been removed into this court for review by petition in error of the unsuccessful party.

The first assignment to which our attention is directed by the brief of counsel for the plaintiff in error is that the district court erred in receiving in evidence the answers to certain leading questions. The extent to which leading questions may be allowed is a subject which rests in the discretion of the trial court, and as we have frequently had occasion to hold, its rulings in that respect will not, in the absence of a clear abuse of discretion, be disturbed by this court. (*Obernalte v. Edgar*, 28 Neb., 70; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 357.) The other assignments all relate to the giving and refusing of instructions.

The court, on its own motion, gave the following, to which exception was taken: "Fraud is not to be presumed, but must be established by the evidence. In the consideration of the question whether or not fraud was practiced upon the defendant in the selection of the axles in question, you must consider all the facts and circumstances attending the transaction and surrounding the parties as they appear from the evidence. While fraud is not to be presumed, it can seldom be established by direct evidence, and in considering the question you must consider all the evidence in regard to the acts of the parties and circumstances of the case. If you find from a consideration of all the evidence that the selection of the axles was fraudulent, or that Hatrick acted fraudulently or dishonestly in making such selec-

tion, then his selection cannot bind the defendant as to such material as the evidence shows you to have been unfit for the purpose for which they were sold." The criticism of counsel is directed to the concluding paragraph of the foregoing instruction, and is, we think, not wholly unmerited. Practically, the answer charges a rescission of the contract on account of the alleged fraud and conspiracy between the plaintiff below and Hatrick. The fraud alleged, if available, is a complete defense, and not alone as to so much of the material selected as proved worthless or unsound. It was, moreover, the defendant's duty, assuming the fraud to have been proved as alleged, to rescind the contract as a whole or not at all. (*Raymond v. Bearnard*, 12 Johns. [N. Y.], 274; *Hendricks v. Goodrich*, 15 Wis., 679*; *Bainter v. Fults*, 15 Kan., 323; *Higham v. Harris*, 108 Ind., 246.) It does not follow, however, that the error assigned is prejudicial, calling for a reversal of the judgment. An inspection of the record discloses that the question of fraud was fairly submitted to the jury, and the amount of the verdict plainly indicates that that defense was rejected as a whole. The defendant could not, therefore, have been prejudiced by the instruction complained of, and the giving of it was harmless error, not calling for the reversal of the judgment.

Counsel also vigorously assail instruction No. 10, given at the request of the plaintiff below, as follows: "The plaintiff asks the court to instruct the jury that there is no dispute, either in the pleadings or between the parties in this case, that one Henry Hatrick was selected by the plaintiff and defendant to make selection of the axles in controversy, and that the defendant only seeks to

Hyde v. Kent.

avoid the selection made by said Hatrick on the ground of fraud and conspiracy between the said Hatrick and the plaintiff, to cheat and defraud the defendant in making such selection. You are instructed that the burden of proof is upon the defendant as to such fraud, and if it has not proved the fraud alleged to the satisfaction of the jury, then the selection of Hatrick is final." As a statement of the issues made by the pleadings this instruction is not strictly accurate. It does, however, correctly state the only proposition about which there was any controversy at the close of the trial, and for that reason presents no ground for complaint on the part of the plaintiff in error.

Complaint is made of the refusal of certain instructions requested by the defendant below, but they were, in so far as they state the law of the case, embodied in those given by the court on its own motion.

We discover in the record no substantial error, and the judgment is accordingly

AFFIRMED.

MARY T. HYDE V. L. H. KENT.

FILED FEBRUARY 4, 1896. No. 5963.

1. **District Court: ADJOURNMENT FOR TERM: REVIEW.** This court will not presume the adjournment *sine die* of a term of the district court from the fact that a period of twenty-three days has intervened since a given day thereof.
2. **Order Setting Aside Judgment: SUMMONS: REVIEW.** Action of the district court in setting aside a judgment and quashing the summons irregularly issued and served, on motion and objection of the defendant at the same term, approved.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Harwood, Ames & Pettis, for plaintiff in error.

William E. Healey, contra.

Post, C. J.

We learn from the record of this cause that on the 19th day of April, 1892, which was a day of the February, 1892, term of the district court for Douglas county, the plaintiff in error recovered a judgment therein by default against the defendant in error in the sum of \$1,118 and costs. On the 11th day of May, following, the defendant entered in said cause his objection to the jurisdiction of the court as follows:

“MARY T. HYDE }
 V.
L. H. KENT. }.

“L. H. Kent, named above, defendant, appearing specially and only for the purpose of objecting to the jurisdiction of the court, and for the stating herein of such objection to the jurisdiction of the court the affidavit of said L. H. Kent, filed herewith, together with all the matters and things therein contained, are herein referred to and made a part hereof.”

The record discloses no ruling upon the foregoing objection, except as hereafter shown, and on December 10 of the same year a motion to quash the summons was interposed by the defendant as follows:

“MARY T. HYDE }
 V.
L. H. KENT. }

“The defendant, appearing specially and for the

purpose of this motion only, objects to the jurisdiction of the court and moves that the pretended service herein of summons be quashed, and for the stating herein of such objection to the jurisdiction of the court, and the reasons for the quashing of said pretended service, the affidavit of said L. H. Kent, filed herein upon May 11, 1892, is referred to and made a part hereof."

Afterward, during the January, 1893, term, to-wit, on January 6, an order was entered setting aside the judgment above mentioned, in which it is recited that the defendant's objection to the jurisdiction of the court had been previously submitted and taken under advisement, and "that from a consideration of the evidence the court finds that the return of the sheriff of service of summons is untrue and that no proper service of summons was made upon the defendant." Exception was in due form taken to the order last named, and which is renewed in this court by proper assignment of error. The objection made to the service is that the summons issued February 6, and served February 13, named February 7 as the answer day. That such objection, if made in season, should have been sustained, is conceded by the plaintiff in error, and is apparent from an inspection of the record, since the summons was, by its command, made returnable the day after it was issued, and was served six days subsequent to the answer day therein named; but it is argued that the district court was without authority to entertain the objection when presented by motion at a term subsequent to that at which the judgment was rendered. It is, however, unnecessary to consider the merits of that proposition, for the reason that it is without any support in the record.

The judgment was, as already appears, rendered April 19, which was a day of the February, 1892, term, while the first objection to the jurisdiction of the court, accompanied by the evidence which was finally submitted to the court, was filed May 11, following, there being nothing to indicate whether the last named day was during the same or a subsequent term. That this court may presume the adjournment *sine die* of a term of the district court from the lapse of time alone is apparent both from reason and authority. (*Conway v. Grimes*, 46 Neb., 288.) It would be useless at this time, if indeed it were possible, to determine the length of time necessary to raise such a presumption. It is sufficient that an adjournment will not be presumed from the time (twenty-three days) intervening between the date of the judgment and the entering of the defendant's objection to process by which it was sought to obtain jurisdiction of the court over his person. Plaintiff also relies upon the rule asserted in *Wilson v. Shipman*, 34 Neb., 573, viz., that all presumptions are in favor of the veracity of the return of the sheriff when assailed in this manner, and that in order to disprove the recitals thereof their falsity must be affirmatively shown. But that rule can have no application to the case at bar, for the reason that the irregularity, for which the judgment was set aside, appears affirmatively from the transcript of the original summons and accompanying return, as well as from the affidavits of the defendant.

Our examination has been confined to the subjects discussed in the briefs of counsel, which do not include the question whether the ruling complained of is a final order, within the meaning of the Code, which may be reviewed upon petition in

 Monroe v. Hanson.

error pending further proceedings in the case by the district court. Upon that question it is, for reasons stated, needless to express any opinion. There is no error in the record, and the order of the district court must be

AFFIRMED.

**JAMES MONROE ET AL., APPELLEES, V. CHARLES E.
HANSON ET AL., IMPEADED WITH W. J.
COOPER & COLE BROS., APPELLANTS.**

FILED FEBRUARY 4, 1896. No. 6043.

1. **Review: EVIDENCE.** The findings of a trial court which are sustained by sufficient evidence will not be disturbed on appeal to this court.
2. **Vendor and Vendee: POSSESSION: NOTICE.** Possession of real estate is ordinarily notice of a claim of right, and is notice to all the world of the rights or interest the person holding possession may have in the property over which it is exercised.
3. **Judgments: PARTIES.** It is a general rule that an adjudication in an action affects only those who are parties to the action, or in privity with them.
4. **Limitation of Actions: MECHANICS' LIENS.** An action in which it is sought, as the relief demanded by the plaintiff or a cross-petitioner, to foreclose a mechanic's lien against the rights or interest of any person in the property covered thereby must have been commenced within two years from the date of filing the lien, or it is barred, so far as the right to foreclose the lien is concerned, by limitation.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

The opinion contains a statement of the case.

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53	606
54	17
54	597
55	604

Lamb, Ricketts & Wilson, for appellants:

The title of Nora M. Jones was litigated by Moore & Jones in the name of Robert A. Moore and Charles E. Hanson, and she is bound by the decree of this court in the former case. (*Tarleton v. Johnson*, 25 Ala., 300; *Clafin v. Fletcher*, 7 Fed. Rep., 851; *Burns v. Gavin*, 118 Ind., 320; *Parr v. State*, 17 Atl. Rep. [Md.], 1020.)

The suit in which the decree of foreclosure of the mechanic's lien of appellants was rendered was properly brought against the person holding the legal title of record of this property, and if other persons are afterwards discovered to own or have an interest in the property they may be foreclosed in equity whenever their interest is discovered. (*Galpin v. Abbott*, 6 Mich., 17; *Child v. Baker*, 24 Neb., 188; *White v. Denman*, 1 O. St., 110; *Parret v. Shaubhut*, 5 Minn., 258; *Tate v. Lawrence*, 11 Heisk. [Tenn.], 503; *Pringle v. Dunn*, 37 Wis., 464; *Carter v. Champion*, 8 Conn., 549; *Isham v. Bennington Iron Co.*, 19 Vt., 230.)

If a deed to a purchaser of an equity of redemption has not been duly recorded at the time of the bringing of the bill, such purchaser is not a necessary party so far as to render the proceedings invalid in any event; and he is not a necessary party even unless he shows affirmatively that at the trial that was had the plaintiff had either actual or constructive notice of the conveyance of the property before suit brought. (*Leonard v. New York Bay Co.*, 28 N. J. Eq., 192; *Kipp v. Brandt*, 49 How. Pr. [N. Y.], 358; *Woods v. Love*, 27 Mich., 308; *Aldrich v. Stephens*, 49 Cal., 676; *Houghton v. Kneeland*, 7 Wis., 244*.)

If the nominal holder of the equity of redemp-

tion or the holder of an equitable title is not made a party in a suit of foreclosure, he may be proceeded against in a subsequent suit and his interest foreclosed. (*Merriman v. Hyde*, 9 Neb., 113; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276.)

P. A. Moore, contra.

HARRISON, J.

This is an action instituted May 7, 1891, by James Monroe to foreclose a mortgage on lot 371, in Kearney, Buffalo county, Nebraska. Charles E. Hanson, Nora M. Jones, W. J. Cooper & Cole Bros., and some others were made defendants. W. J. Cooper & Cole Bros. filed a cross-petition in which it was pleaded that they, between the 1st day of October, 1886, and the 1st day of January, 1887, pursuant to a contract entered into with Charles E. Hanson, the owner of the lot described, furnished the material and placed in a brick building, then in process of erection thereon, the necessary apparatus or appliances for heating the same by steam, and on January 31, 1887, filed and perfected a lien upon the premises for the balance due them on account, \$523; that one Walter Knutzen, who had a mechanic's lien on the premises involved in the present action, commenced suit to foreclose it June 4, 1887, in which W. J. Cooper & Cole Bros. were made parties and filed a cross-petition on June 27, 1887, asking a foreclosure of their lien, which was denied them in the trial court, but in an appeal to this court the decree was reversed and they were accorded a foreclosure. Their petition in the case at bar prayed the establishment of their lien as a first and prior one, and its foreclosure. To this

answer and cross-petition Nora M. Jones of defendants pleaded that on the 7th day of January, 1887, by purchase from R. A. Moore, then owner of the premises involved in this suit, she became the owner and immediately assumed possession of them, and has at all times since retained the ownership and possession; that the deed to her of the property bore date of January 8, 1887, and was recorded June 7, 1887, and that no action had ever been commenced against her to foreclose the lien of W. J. Cooper & Cole Bros., nor had its foreclosure ever been sought in any action in which she was a party; that more than two years have elapsed since their lien was filed, and any action for its enforcement is barred by limitation. The trial court decided the issues between W. J. Cooper & Cole Bros. and Nora M. Jones in favor of Mrs. Jones and rendered a decree accordingly, from which the lien-holders have appealed to this court.

It appeared in the trial of the present case, and is undisputed, that on June 4, 1887, Knutzen commenced an action to foreclose a mechanic's lien on the premises involved in the case now under consideration; that appellants herein were parties to that action, filed their cross-petition to foreclose their lien, were defeated in the trial court, but on appeal to this court were successful and obtained the relief sought. Nora M. Jones was not made a party to the Knutzen suit, nor was she served with process therein. The premises involved were transferred by Charles E. Hanson to R. A. Moore, and by Moore to Mrs. Jones prior to the time the Knutzen case was commenced.

At the time the property was so transferred,

and continuing to and including the time of the pendency of the Knutzen suit, E. B. Jones, the husband of Nora M. Jones, was in partnership with R. A. Moore in the law and real estate business, and it is claimed for appellants that the evidence discloses the purchase of this property from Hanson for the partnership, and that the conveyance to Mrs. Jones was not to her in her own right, but in trust for her husband, and that he, although not appearing on the record in the Knutzen case as a party thereto, was the real party interested, and litigated his rights and as against this particular lien through the names and defenses of R. A. Moore and Charles E. Hanson, both parties to that suit, and, having so proceeded, is bound by the judgment therein. We need not further discuss this contention than to say that the facts established by the testimony warranted the trial court in finding that the property was sold to Nora M. Jones by Moore and conveyed to her not in trust for her husband, but as her individual and separate property, and this finding being sustained by sufficient evidence, will not be disturbed.

It is contended by counsel for appellants that "the suit in which the decree of foreclosure of the appellants' mechanic's lien was rendered was properly brought against the person holding the legal title of record of this property, and that if other persons are afterwards discovered to own or have an interest in the property, they may be foreclosed in equity whenever their interest is discovered;" also, "if a deed to a purchaser of an equity of redemption has not been duly recorded at the time of the bringing of the bill, such party is not a necessary party so far as to render the proceed-

ings invalid in any event, and he is not a necessary party even unless he shows affirmatively that at the trial that was had the plaintiff had either actual or constructive notice of the conveyance of the property before suit brought;" and further, "if the nominal holder of the equity of redemption or the holder of an equitable title is not made a party in a suit of foreclosure, he may be proceeded against in a subsequent suit and his interest foreclosed." The evidence disclosed that Mrs. Jones purchased the property January 7, 1887; that it was conveyed to her by deed dated January 8, 1887, but which was not recorded until June 7, 1887, or three days subsequent to June 4, 1887, the date of the commencement of the first action, or the Knutzen case, by which name we have designated it to distinguish from the case at bar. The deed of conveyance from Moore to Mrs. Jones was not, or could not be, produced at the trial of the case and the record of the same was introduced. On the margin of the page of the book in and on which it was copied appeared the following statement:

"Original instrument was presented for correction on November 30, 1892, and the record was corrected by adding the name of H. C. Andrews as a witness thereto.

H. H. SEELEY,

"County Clerk."

It is urged for appellants that it appeared from this that the record of the conveyance, as it existed on June 7, 1887, was of a deed which was not properly executed and was not notice of the rights of the grantee; that "the registration of a deed defectively executed is not notice." If the recitals of this entry on the margin of the page of the book in which the deed was recorded can properly be

said to be evidence of anything, they would seem to indicate that in recording the instrument the clerk had omitted the name of the witness and it had been presented for the purpose of having the correction made, the omission supplied, and probably the failure of the officer to properly record the instrument could not be allowed to prejudice the rights of the party presenting it for record. We need not decide this question, however, but may pass it without expressing our opinion, as it was fully established by the evidence that Mrs. Jones, when she purchased the property, immediately entered into the possession thereof and was in possession of it and collecting the rents at the time the Knutzen suit was commenced and the cross-petition of W. J. Cooper & Cole Bros. was filed therein, and during and after its pendency and trial. The continued possession of Mrs. Jones was notice to all the world of her rights in the premises (*Lipp v. South Omaha Land Syndicate*, 24 Neb., 692); and if either the plaintiff or cross-petitioner desired to affect her rights by the decree and judgment in the action, she should have been made a party to and brought into the suit, and as it was not done, she was not bound or her interests affected by it. It is the general rule that no person can be affected by any judicial proceedings to which he is not a party, and a judgment takes effect only between the parties and gives no rights to or against third persons. (1 Freeman, Judgments, sec. 154.) So a foreclosure is only effectual against those interested in the title who were parties. (2 Ballard's Annual on the Law of Real Property, sec. 547; 2 Jones, Mortgages, secs. 1397-1406; *Merriman v. Hyde*, 9 Neb., 113.) "A person who is not a party to a suit

ordinarily is not bound by the adjudication, nor is a suit deemed commenced against one until he is made a party to it." (*Green v. Sanford*, 34 Neb., 366; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276.)

In reference to the right to institute the action against a person not a party to the prior suit, in which foreclosure of a mechanic's lien was sought, or in a subsequent action as a cross-petitioner, to litigate the rights of such person and foreclose the lien as to the interest of such person in the property affected thereby, it may be said that the subsequent action in which the foreclosure of the lien is demanded, either by the lien-holder as plaintiff or as cross-petitioner, must be commenced within the life of the lien, or within two years after the time of its filing. The lien of W. J. Cooper & Cole Bros. was filed January 31, 1887. The suit in which they filed their cross-petition praying that the lien be established against the rights of Nora M. Jones was not commenced until May 7, 1891, more than four years after the lien was filed, and the right of action thereon as to her or her interest in the property was barred by limitation. (*Squier v. Parker*, 56 Ia., 409; *Green v. Sanford*, 34 Neb., 363; *Burlingim v. Cooper* 36 Neb., 73; *Pickens v. Polk*, 42 Neb., 267; *Ballard v. Thompson*, 40 Neb., 529.) The judgment of the district court is

AFFIRMED.

JAMES J. FELBER v. A. M. GOODING, ADMINIS-
TRATOR.

FILED FEBRUARY 4, 1896. No. 6056.

Review: BILL OF EXCEPTIONS: AUTHENTICATION. The mat-
ters contained in what purports to be a bill of exceptions
need not be examined or considered in this court unless
such document is authenticated by a certificate of the
clerk of the proper district court, identifying it.

ERROR from the district court of Cedar county.
Tried below before NORRIS, J.

*Wilbur F. Bryant and J. C. Robinson, for plaintiff
in error.*

Barnes & Tyler, contra.

HARRISON, J.

The defendant in error was appointed admin-
istrator of the estate of Henry Felber, deceased,
by the county court of Cedar county, and, upon
presentation and examination of his final re-
port as such administrator, it was, as to cer-
tain items therein, disallowed, from which de-
termination of the matters adjudicated the ad-
ministrator appealed to the district court. A
trial of the points in controversy resulted in their
decision favorable to the administrator. From
this, error proceedings have been prosecuted to
this court on behalf of one of the heirs of Henry
Felber, deceased, who had objected to the allow-
ance of the report of the administrator in the
county court, and contested the questions in-
volved in the hearing upon appeal.

To understand and properly determine any of

47	88
47	164
47	38
50	166
50	310
51	473
54	506

the questions raised by the assignments of error and discussed in the brief of the complaining party, necessitates an examination of the evidence introduced before the trial court. In the record there is what purports to be a bill of exceptions as allowed by the trial judge, but the only authentication by the clerk of the district court of any portion of the papers presented here is as follows: "I, John J. Goebel, clerk of the district court in and for said county, do hereby certify that the within and foregoing is a true and correct copy of the 'objections of James J. Felber, motion for new trial, and last journal entry,' as the same are on file and of record in my office at Hartington, Nebraska." From this it will readily be seen that there is a very small part of the files of the case in this court authenticated by the certificate of the clerk of the district court, as required by law, and that the bill of exceptions is not included. It is indispensably necessary that a bill of exceptions be properly authenticated. If not, it will not be examined or considered. (Code Civil Procedure, sec. 587b; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402; *Moore v. Waterman*, 40 Neb., 498.) As the adjudication of points discussed and contended for by plaintiff in error must be governed by conclusions formed from an examination of the evidence, and the bill of exceptions containing the testimony is not authenticated in such a manner as to present it here for examination, it follows that the assignments of error are not supported, must be overruled, and the judgment or decree of the district court

AFFIRMED.

47	40
49	433
50	157

HENRY HORNBERGER V. STATE OF NEBRASKA.

FILED FEBRUARY 4, 1896. No. 8030.

1. **Intoxicating Liquors: UNLAWFUL SALE: INFORMATION.**
Held, That the information was framed under section 20, chapter 50, Compiled Statutes, and charges a single offense, namely, that the accused kept intoxicating liquors in his place of business for the purpose of sale without a license or permit.
2. ———: ———: **EVIDENCE.** The unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law.
3. ———: ———: **BURDEN OF PROOF.** When, under an information for keeping intoxicating liquors for sale, a sale is proved, the burden is upon the accused to show that he held a license or permit from the proper authorities.
4. **Evidence: RECORD.** The existence of a record may be proved by its production, or an authenticated copy thereof. The non-existence of a record may be proved by the testimony of one who is cognizant of such fact.
5. **Intoxicating Liquors: LICENSES: ORDINANCES.** The sale of intoxicating liquors within cities and villages can only be carried on under ordinances duly enacted by the corporate authorities thereof. Until a proper ordinance is adopted, no license or permit for the sale of liquors within such corporate limits can lawfully issue.
6. **Evidence: INCORPORATION OF VILLAGES.** Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislature has in said act declared it to be a public law.
7. **Criminal Law: DIRECTING VERDICT.** It is not error to refuse to direct a verdict for a defendant in a criminal prosecution, at the close of the testimony for the state, where the evidence before the jury would warrant a conviction.
8. **Harmless Error: INSTRUCTIONS.** A conviction will not be reversed for the giving of an instruction containing harmless error.

Hornberger v. State.

9. **Costs: ATTORNEYS' FEES.** An attorney's fee cannot be taxed against a defendant, under section 22, chapter 50, Compiled Statutes, in a case prosecuted by the county attorney.
10. **Criminal Law: ORDER REMANDING CAUSE FOR JUDGMENT.** As the only prejudicial error in the record relates to the entering of judgment upon the verdict, the cause is remanded to the trial court, with directions to enter a proper judgment on the verdict. *Dodge v. People*, 4 Neb., 220, and *Griffen v. State*, 46 Neb., 282, followed.

ERROR to the district court for Sarpy county.
Tried below before BLAIR, J.

Schomp & Corson, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

NORVAL, J.

Plaintiff in error was convicted of keeping intoxicating liquors for the purpose of sale without a license, in violation of law, and was sentenced to pay a fine of \$100 and costs of suit, and an attorney's fee of \$50 to William R. Patrick. The information under which the prosecution was had, omitting the verification, is as follows:

"STATE OF NEBRASKA, }
COUNTY OF SARPY. } ss.

"In the District Court of the Fourth Judicial District of Nebraska, in and for Sarpy County.

"THE STATE OF NEBRASKA, Plaintiff, }
v. }
HENRY HORNBERGER, Defendant.

"Be it remembered, that Henry C. Lefler, county attorney in and for Sarpy county, and in the fourth judicial district of the state of Nebraska, who prosecutes in the name and by the authority

of the state of Nebraska, comes herein in person into this court at this, the October term, A. D. 1894, thereof, and for the state of Nebraska gives the court to understand and be informed that he has reason to believe, and does believe, that intoxicating liquors, to-wit, beer and whiskey, were unlawfully and willfully kept by one Henry Hornberger in a certain two-story frame building, occupied and conducted as a drug store by the said Henry Hornberger, and situated on lot 8, block 102, in the village of Bellevue, in said county and state, on or about the 26th day of May, 1894; that said liquor above described was intended to be, and was then and there being, by and under the direction of the said Henry Hornberger, unlawfully sold, without a license or druggist's permit having been obtained by said Henry Hornberger for the sale of said liquors above described, according to law, and that within thirty days preceding the 26th day of May, 1894, to-wit, on or about the 23d day of May, 1894, malt and spirituous liquors, to-wit, beer and whiskey, were by said Henry Hornberger sold in said premises above described, without license or druggist's permit, in violation of the provisions of chapter 50 of the Statutes of Nebraska, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

HENRY C. LEFLER,

"County Attorney."

The defendant filed a motion in the court below to quash the information, on the ground that it did not set out the names of the persons to whom the sale of the liquors was alleged to have been made, which motion was overruled, and this decision is assigned as error.

It is, doubtless, true, as counsel for the accused in their brief contend, that in an information for the sale of intoxicating liquors the names of the persons to whom the unlawful sales were made must be alleged, if known, and if unknown, such fact should be averred as an excuse, or the information will be defective. Such is the holding of this court. (*State v. Pischel*, 16 Neb., 608; *Martin v. State*, 30 Neb., 423.) It will be observed that the information herein does not contain such averment, and for that reason would be bad if the prosecution was for the violation of section 11 of chapter 50 of the Compiled Statutes, which makes it a misdemeanor for one to dispose of liquors without a license; but it is clear the information was framed under section 20 of said chapter, which makes it unlawful for any person to keep intoxicating liquors for the purpose of sale without license, and prescribes a penalty therefor. The gravamen of the charge here is not the selling of liquors in violation of law, but the keeping them in his place of business for sale without a license. The averment in the information relating to sales made by the defendant was inserted to show his unlawful intent in keeping the liquors for sale in contravention of the statute. Such unlawful intent may be presumed from the fact of their sale without license. (*Rauschkolb v. State*, 46 Neb., 658.) It was unnecessary to allege the names of the vendees of the liquors, and the motion to quash was properly overruled.

Objection was made to permitting Harry F. Clark to answer the following interrogatory, propounded to him by the state: "Q. You may state to the jury, in your own way, what took place there on that occasion with reference to any intox-

icating liquors of any character." The witness had already testified that he was acquainted with the accused, and to the witness' having been in the defendant's place of business on or about a certain day of May preceding the trial, when the accused and others were present. The criticism that the question was too general in its scope is not tenable. The purpose of the testimony sought to be elicited was relevant and material to the issue to be tried, whatever may be said as to the competency of the answer given by the witness. No objection, however, was made to the answer upon any ground; hence, it is not before us for review.

One John Nolan, the chairman of the board of trustees of the village of Bellevue, the municipality within which the alleged offense was committed, was examined as a witness on behalf of the state, and testified to purchasing and drinking beer in defendant's drug store on the 15th of May. The witness made further answers to questions put by the state, over the objections of the defendant, as follows:

76 Q. You may state to the jury whether or not a license for the sale of liquor, or a druggist's permit for the sale of liquor, was ever issued to the defendant by the board of trustees of the village of Bellevue.

Objected to as incompetent, irrelevant, immaterial, and for the further reason it is not shown that at that time he was chairman of the board of village trustees. Overruled, and defendant excepts.

A. Not since I have been a member.

77 Q. How long have you been a member of the board of trustees of the village of Bellevue?

A. This is my seventh year.

78 Q. Continuously?

A. Yes, sir.

* * * * *

84 Q. Mr. Nolan, do you know whether or not the village trustees of Bellevue, by reason of any existing ordinance, are authorized at the present time, or whether or not they were empowered during the month of May last, to issue a license or druggist's permit?

Objected to as incompetent, hearsay, and that the records of the village of Bellevue are the best evidence. Overruled, and defendant excepts.

A. We had no ordinance. There was no ordinance empowering us to grant a permit to sell liquor, or give a license, in force them days.

85 Q. And never has been?

A. Not as I know of since I have been on the board.

86 Q. I will ask you if you know whether or not any application was ever made, by the defendant Hornberger, to the trustees of the village of Bellevue, either for a license or a druggist's permit, during the last year?

Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

A. Not to my knowledge.

The testimony objected to was immaterial, since, after the state had proved a sale of liquors, the *onus* was upon the accused to prove that he had a license or permit from the proper authorities. He not having introduced any evidence tending to establish that he possessed such license or permit, the state was not called upon to establish a negative. (*State v. Cron*, 23 Minn., 140; *State v. Bach*, 36 Minn., 234.) The defendant could not have been in the least prejudiced before the jury

by the admission of the testimony quoted above, merely because the state made a stronger case than it was required to do.

It is contended, in argument, that question 76 was objectionable, in that it did not call for the best evidence. In other words, whether or not a permit or license was issued to the defendant for the sale of intoxicants, the recorded proceedings of the board of trustees were the best evidence of the fact of the issuing or non-issuing of such license or permit. Undoubtedly the journal of the proceedings of such board is admissible in evidence for the purpose suggested; but it is equally clear that it is proper to show that a license was not granted to a particular person by the testimony of the officer whose duty it would be to issue such license, if one were granted.

The contention is made that the testimony of Nolan as to the non-existence of an ordinance of the village authorizing the granting of liquor licenses or druggists' permits was incompetent and immaterial, for the reason such right is conferred by statute, and such power is not derived from ordinances. In this counsel is in error. They must have overlooked *State v. Andrews*, 11 Neb., 523, where it was held that "the traffic in liquors within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof. Until this is done, no application can be made and no other step taken towards the procurement of a license to sell liquors within the limits of such corporation." If the village of Bellevue had not, by ordinance duly enacted, empowered its board of trustees to license and regulate the sale of intoxicating liquors within the limits of the village, it requires no ar-

gument to show that the keeping of liquors by the accused for sale within said corporation was without sanction of law. An ordinance, or a certified copy thereof, is the best evidence of its contents; but the non-existence of an ordinance of necessity cannot be proved in that mode. It can be established by the testimony of the person who is cognizant of such fact, or it may be presumed by the absence of entry in the record of licenses. There is a marked difference between testifying to the existence of a record and the absence of it. (*Gutta Percha & Rubber Co. v. Village of Ogallala*, 40 Neb., 775; *Smith v. First Nat. Bank of Chadron*, 45 Neb., 444.)

Complaint is made of the overruling of the defendant's motion to dismiss, at the close of the state's testimony, on the ground no case had been made out against the prisoner. It is conceded in the brief that the prosecution, when it closed its case, had proven that the accused had intoxicating liquors in his possession when arrested, which were seized under a search warrant; and further, had the state rested after showing the arrest of defendant and the seizure of the liquors, the burden would have been upon him, under the statute, to have shown that such liquors were kept for a lawful purpose, and not in violation of law; but it is argued that inasmuch as the state assumed the *onus* of proving that the defendant had no permit or license from the board of trustees of the village of Bellevue to sell intoxicating liquors, it became necessary for the state to establish that fact beyond a reasonable doubt, and that the prosecution failed in that regard; therefore the defendant was entitled to a peremptory instruction to the jury to return a verdict of acquittal. This

argument is based upon the erroneous assumption that the state had failed to establish that no license or permit had been issued to the defendant by the board of trustees. It was not only proven that no such license or permit was issued, but that none could have been granted, since the corporate authorities of the village never had been authorized by ordinance so to do.

It is said there is no competent evidence in the record of the incorporation of the village of Bellevue, and if it is unincorporated, the county board of Sarpy county alone possessed the power to grant a license or permit to sell intoxicating liquors, and since the state failed to show that one was not issued by such board, there can be no conviction. It is true no articles of incorporation and no legislative enactment incorporating Bellevue were put in evidence, but this is not fatal to the prosecution. It was shown upon the trial that said municipality elected village officers annually for years, during which time the powers of a village had been exercised by a board of trustees. Sufficient was established to show that Bellevue was, at least, a *de facto* corporation. (*Arapahoe Village v. Albee*, 24 Neb., 242.) Further, we know, although not proven upon the trial, that Bellevue was incorporated by special act passed by the territorial legislature and approved March 15, 1855. (Session Laws, 1855, p. 382.) Its incorporation has been subsequently recognized by the legislature by the passage of amendments to its charter and changing the geographical limits of the municipality. (See Session Laws, 1855, p. 423; Session Laws, 1855-56, p. 171; Session Laws, 1858, p. 339; Session Laws, 1859-60, p. 109; Session Laws, 1860-61, p. 173; Session Laws, 1861-62, p. 135; Ses-

sion Laws, 1869, p. 269.) The foregoing acts are not, strictly speaking, private in their character, but are generally known and regarded as public local laws. By section 8 of "An act to amend an act entitled 'An act to incorporate Bellevue city' " (Session Laws, 1862, p. 135) it is provided: "This act and the act to which this is amendatory are hereby declared to be public acts," etc. Thus it will be observed that the legislature has declared the act incorporating Bellevue and the acts amendatory thereto to be public laws, and the courts will take judicial notice of such laws without proof of their existence. (*Bowie v. City of Kansas City*, 51 Mo., 454; *Town of Butler v. Robinson*, 75 Mo., 192.) The rule is stated thus in 1 Dillon, Municipal Corporations [3d ed.], sec. 83: "Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect." (See 1 Beach, Public Corporations, sec. 74.) In *Hard v. City of Decorah*, 43 Ia., 313, Day, J., in delivering the opinion of the court, observes: "Where a town or city is incorporated by special act of the legislature, the statute partakes of the nature of a public act, and courts take judicial notice of it." This doctrine is fully sustained by the authorities. (*Prell v. McDonald*, 7 Kan., 426; *City of Solomon v. Hughes*, 24 Kan., 211; *Case v. Mayor of Mobile*, 30 Ala., 538; *State v. Mayor of Murfreesboro*, 30 Tenn., 216; *Stier v. City of Oskaloosa*, 41 Ia., 353; *State v. Tosney*, 26 Minn., 262; *Perryman v. City of Greenville*, 51 Ala., 507; *Village of Winooski v. Gokey*, 49 Vt., 282; *Doyle*

v. Village of Bradford, 90 Ill., 416; *Beaty v. Knowler*, 4 Pet. [U. S.], 152.)

We must not be understood as holding that courts will take judicial notice of the organization of cities and villages under the general laws of the state authorizing cities and villages to become incorporated, as this question is not before us. What we do decide is that where a city or village is incorporated by special act of the territorial legislature, we will take judicial notice of its incorporation, when the legislature has in said act declared it to be a public statute. We are mindful of the fact that the legislative enactments already mentioned incorporate "Bellevue city." We know judicially that Bellevue contains a population of less than 1,500 and more than 200. Therefore, by virtue of section 40 of the act of the legislature of 1879, entitled "An act to provide for the organization, government, and powers of cities and villages" (Session Laws, 1879, p. 193), Bellevue became *ipso facto* a village, governed by the provisions of said act. (*State v. Palmer*, 10 Neb., 203; *State v. Holden*, 19 Neb., 249; *State v. Babcock*, 25 Neb., 709.) It follows that its corporate authorities possessed the power to regulate and license the traffic of liquors within the limits of the corporation. There was no error in refusing to direct a nonsuit. If there had been no evidence before the jury sufficient to sustain a conviction, then, and then only, would it have been proper for the court to direct a verdict for the defendant below.

The next assignment of error is predicated upon the first paragraph of the instructions, which is in the following language: "The court instructs the jury that in order to find the defendant guilty it is

only necessary that the jury believe from the evidence, beyond a reasonable doubt, that the defendant, either by himself, his agent, or servant, on the 26th day of May, 1894, or within thirty days preceding that time, in the county of Sarpy and state of Nebraska, kept for sale, without license or permit, beer or whiskey." Two criticisms are made upon this instruction. It is claimed to be erroneous, because it failed to inform the jury that the liquors must have been kept for sale in the corporate limits of Bellevue, in order to constitute the offense charged. Plaintiff in error could not have been prejudiced by this omission, since the evidence was directed to proving that the defendant had the liquors in his place of business in the village of Bellevue, for the purpose of sale, and no testimony was offered to show that he had liquors anywhere else. In the next place this instruction is claimed to be bad, inasmuch as it limited the time within which the offense must be committed to thirty days prior to May 26, 1894. Had the place wherein the liquors were found been described in the information as the residence of the accused, then, under section 20 of chapter 50 of the Compiled Statutes, the limitation stated by the court would have been not only proper, but indispensable; but as the place set forth in the information is not a residence, the thirty days' limitation was unnecessary. It was more favorable to the defendant than he had a right to ask. The information was filed October 3, 1894, and as the penalty provided by law for the crime is not restricted to a fine of less than \$100, the state had a right to show that the offense was committed at any time within eighteen months prior to the filing of the information. The error in the instruction was harmless. (*Jolly v. State*, 43 Neb., 857.)

By the third instruction the court told the jury, in effect, that the burden of showing a license or permit was upon the defendant. In this there was no error.

The motion in arrest of judgment is based upon an alleged insufficiency of the information. Having already held that a crime was charged, this assignment requires no further attention.

It is finally insisted that the judgment is contrary to law and is not supported by the findings, in so far as it awarded an attorney's fee of \$50 to William R. Patrick, to be paid by the plaintiff in error. Section 22 of said chapter 50 provides: "In case the defendant is acquitted, he shall be discharged and the liquors returned; but if found guilty, in addition to the payment of a fine he shall pay all costs of prosecution, including a reasonable attorney's fee to the prosecuting attorney (in case the county attorney does not prosecute), to be determined by the court, in no case less than twenty-five dollars, which shall be taxed in the costs, and recovered as other costs." It is proper for the trial court under this statute, in case of a conviction, to tax against the defendant a fee of not less than \$25, to be paid to the attorney who prosecuted, only where the county attorney does not conduct the prosecution. While the bill of exceptions shows that Mr. Patrick examined the witnesses, it appears from the journal entry in the case that the state was represented on the trial by "Henry C. Lefler, county attorney." This being true, no attorney's fee should have been allowed.

No other error being found in the record, the judgment, in accordance with *Dodge v. People*, 4 Neb., 220, and *Griffen v. State*, 46 Neb., 282, is reversed and the cause remanded to the district

Warren v. Sadilek.

court, with directions to enter the proper judgment on the verdict heretofore returned.

REVERSED AND REMANDED.

JOSHUA WARREN V. FRANK J. SADILEK.

FILED FEBRUARY 4, 1896. No. 5641.

1. **Justice of the Peace: MISCONDUCT OF OFFICER.** A justice of the peace has no jurisdiction to hear and determine an action brought against a public officer for misconduct in office. Rule applied.
2. **Judgment of Reversal Upon Finding of Error.** *Held*, That the findings are sufficient to support the judgment.

ERROR from the district court of Saline county.
Tried below before BUSH, J.

J. D. Pope, for plaintiff in error.

E. E. McGintie and *A. S. Sands*, *contra*.

NORVAL, J.

This action was brought by Joshua Warren against Frank J. Sadilek, before a justice of the peace, to recover the sum of \$11.44. Plaintiff had judgment for the amount claimed, and defendant prosecuted error to the district court, where a judgment of reversal was entered and the action dismissed. Plaintiff brings the case to this court on error.

The main question presented by the record for decision is whether the justice of the peace had jurisdiction of the subject-matter of the action.

Section 907 of the Code of Civil Procedure provides that "justices shall not have cognizance of any action: * * * Third—In actions against justices of the peace or other officers for misconduct in office, except in cases provided for in this title." This statute specifically prohibits one justice of the peace from adjudicating upon the official misconduct of another justice of the peace or other public officer. Therefore, if this action is predicated upon the official misconduct of the defendant while in office, as is claimed by the defendant, the justice had no power to hear and determine the same; and the judgment of the justice was properly reversed for want of jurisdiction to render it. The bill of particulars alleges, in substance and effect, that the defendant was and is the county treasurer of Saline county; that on the 28th day of July, 1891, there was due from the plaintiff as taxes on personal property for the year 1889 the sum of \$49.20; that on said day demand was made upon plaintiff for said money, through the defendant's tax collector, which sum the plaintiff paid on the following day and received credit therefor in payment of his said taxes; that afterwards the defendant issued a distress warrant for the said sum of \$49.20 against plaintiff for his personal taxes of 1889, which writ was levied upon certain personal property of plaintiff on July 31, 1891, and to prevent the sale thereof under said levy plaintiff paid the defendant, under protest, the amount demanded by him, to-wit, \$60.67, the same being the above amount of taxes for the year 1889, and \$11.47 costs, fees, and charges made under said writ; and that subsequently defendant returned to plaintiff the sum of \$49.23. This action is to recover the amount aforesaid paid as fees

and costs. Do these facts show that the gist of the action is the official misconduct of the defendant as county treasurer? We must answer the question in the affirmative. It is disclosed that he received and collected the moneys from the plaintiff, not as an individual, but in his official capacity. The taxes upon which the distress warrant was issued had already been paid, and to release his property from the levy, the plaintiff was compelled to pay them again, as well as more than \$11 for costs. The taxes having been previously received by the county treasurer, he was not entitled to fees or costs. If the acts of the defendant do not establish official misconduct, or, as expressed in the statute, "misconduct in office," then it is scarcely possible for a cause of action against a county treasurer for official misconduct to ever accrue. It is of the official acts and conduct of the defendant, and not his personal actions, of which complaint is made. *Neihardt v. Kilmer*, 12 Neb., 36, is not in point. As the fact alleged constitutes misconduct in office, the justice had no jurisdiction of the action.

It is insisted that the finding of the district court is insufficient to sustain the judgment of reversal. The finding was that error existed as alleged in the petition in error. This pleading contained four assignments, viz.:

1. The bill of particulars fails to state a cause of action.

2. The justice court had no jurisdiction to hear and determine the action.

3. The action is brought for alleged misconduct in office of the defendant as county treasurer, and said justice court is expressly prohibited by law from assuming jurisdiction to hear and determine said cause.

4. The judgment of the justice court is wholly without jurisdiction of the subject-matter, and void.

The general finding by the district court of error in the record was sufficient, without specifying which assignment of the petition in error was sustained. (*Haller v. Blaco*, 14 Neb., 196.) The judgment of the court below is

AFFIRMED.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA V. LAURA MARTIN, ADMINISTRATRIX.

FILED FEBRUARY 4, 1896. No. 6009.

1. **Appeal: PARTIES.** The parties to a judgment, or their privies, alone can prosecute an appeal or petition in error.
2. ———: ———: **DISMISSAL.** A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered.

ERROR from the district court of Adams county.
Tried below before BEALL, J.

W. S. Morlan, Marquett & Devecse, and F. E. Bishop, for plaintiff in error.

John Doniphan and Batty & Dungan, contra.

NORVAL, J.

A suit was instituted in the district court of Adams county by Laura Martin, administratrix of the estate of James Martin, deceased, against the Burlington & Missouri River Railroad Company in Nebraska to recover damages for negligently

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causing the death of her husband. After the petition and answer were filed, by order of the court below, the Chicago, Burlington & Quincy Railroad Company was substituted as party defendant in the cause, instead of the corporation first above named. Upon the trial a verdict was returned in favor of the plaintiff against the substituted defendant for \$5,000, which was followed by a judgment for a like sum, to reverse which the Burlington & Missouri River railroad in Nebraska has prosecuted a petition in error, in its own name, to this court.

The proceedings must be dismissed, since it does not appear from the record that this plaintiff in error is in any manner interested in the controversy, or affected by the judgment sought to be reviewed. It is disclosed, after the said order of substitution was made, the title of the cause was changed, and all papers thereafter filed therein, and the bill of exceptions, verdict, and judgment were entitled "Laura Martin, Administratrix, Plaintiff, v. Chicago, Burlington & Quincy R. R. Co., Defendant." This plaintiff in error was completely dropped out of the case when the order of substitution was entered, appeared no further therein, and no judgment was rendered against it, therefore there is not anything of which it could complain. Certainly it cannot champion the lost cause of another separate and distinct corporation, not before the court, unless a privity of interest is shown, which is not the case before us so far as we can gather from the record. It is only the parties to a judgment, or their privies, who can prosecute an appeal or petition in error. (Elliott, Appellate Procedure, secs. 132 *et seq.*, and cases there cited.)

DISMISSED.

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F. H. GILCREST V. HENRY NANTKER.

FILED FEBRUARY 4, 1896. No. 5984.

New Trial: PETITION. A petition by a plaintiff for a new trial, under section 602 of the Code, after the term at which judgment was rendered, is properly denied where the petition in the original suit fails to state sufficient facts to have supported a judgment in his favor, and where it does not appear that his alleged cause of action is meritorious.

ERROR from the district court of Buffalo county.
Tried below before HOLCOMB, J.

R. A. Moore, for plaintiff in error.

References: *Horn v. Queen*, 4 Neb., 108; *Thompson v. Sharp*, 17 Neb., 71; *Luce v. Foster*, 42 Neb., 818; *White v. Gray*, 61 N. W. Rep. [Ia.], 173; *Senn v. Joseph*, 17 So. Rep. [Ala.], 543; *Taylor v. Evans*, 29 S. W. Rep. [Tex.], 172; *Graham v. Reno*, 38 Pac. Rep. [Colo.], 835; *Erskine v. McIlrath*, 62 N. W. Rep. [Minn.], 1130; *Fischer v. Hetherington*, 32 N. Y. Sup., 795; *Beardsley v. Pope*, 32 N. Y. Sup., 926; *Smithson v. Smithson*, 37 Neb., 539; *Clutz v. Carter*, 12 Neb., 113; *Stoll v. Sheldon*, 13 Neb., 207; *Dalton v. West End Street R. Co.*, 34 N. E. Rep. [Mass.], 261; *Harper v. Nat. Life Ins. Co.*, 5 C. C. A., 509.

Marston & Nevius, contra.

NORVAL, J.

This was an action in equity brought in the court below by the plaintiff in error against Henry Nantker to obtain a new trial in a suit at law between the same parties. A general demurrer to the petition was sustained and the cause dismissed. The

original action was to recover damages for alleged deceit and false representations in the sale of a horse by Nantker to Gilcrest. The verdict was for the defendant. Plaintiff's motion for a new trial was overruled, and judgment was rendered for the defendant, which was affirmed by this court at the September, 1894, term, for the reason the petition failed to state a cause of action. The record shows that the district court offered in the original cause to sustain the motion for a new trial and permit the plaintiff to amend his petition, conditioned alone that the costs of the trial should be taxed to the plaintiff. Gilcrest, by his attorney, elected to stand upon his motion, and declined to amend his petition, whereupon said motion was overruled.

The facts set forth in the application for equitable relief against the judgment, briefly stated, are these: That when the motion for a new trial came on for hearing and decision, R. A. Moore, who had represented the plaintiff in the cause from its inception, appeared for said plaintiff and elected for him to stand upon said motion, and not to submit to the order of the court relating to amending of the petition and the taxing of costs; that said election was made without said attorney consulting with his client and while plaintiff was absent from Buffalo county, he being at the time in the city of Omaha, and possessing no knowledge that the motion would be called up in his absence from the county; that on his return from Omaha, and before he had an opportunity to consult with his said attorney, he was taken dangerously ill, and by reason thereof was confined to his bed for the period of two or three months thereafter, and until after the adjournment of the term of court at which the judgment was pronounced; that during said

illness he was prohibited by his physician from consulting with the members of his own family or others upon matters of business, much less his said attorney; that as soon as plaintiff recovered from said illness and was able to converse with his attorney, he was informed by Mr. Moore of the order of the court and the disposition made of the case, whereupon he instructed his attorney that he desired to abide the order of the court made in passing upon the motion for a new trial, and submit to the payment of costs; and the petition for a new trial was soon thereafter prepared and filed. The petition for a new trial was made after the term at which the judgment complained of was rendered, and is based upon paragraph 7 of section 602 of the Code of Civil Procedure, which provides for granting new trials "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Whether the facts alleged in the application bring the case within the quoted provision of the statute we do not decide, since it is clear, from other considerations hereafter stated, that the demurrer to the petition was rightfully sustained on another ground. The petition in the original suit did not state a cause of action. This, as already mentioned, was decided in *Gilcrest v. Nantker*, 42 Neb., 564, and wherein the pleading was defective need not be restated. The averments being insufficient to entitle the plaintiff to recover, it is obvious that a new trial, if granted, would have been a barren victory, unless an amended petition was filed. True, plaintiff might have recast his pleading, if the facts would allow him to do so; but his application for a new trial contains no averment that the defects in the petition could be remedied by

amendment, nor that he has a meritorious cause of action, and no fact constituting his alleged cause of action is pleaded. This court has held, where a defendant petitions for a new trial after the term at which judgment was entered, he must plead the facts showing that his alleged defense is meritorious, otherwise his application will be defective. (*Gould v. Loughran*, 19 Neb., 392; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552; *Osborn v. Gehr*, 29 Neb., 661; *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135; *Hughes v. Housel*, 33 Neb., 703; *Petalka v. Fitle*, 33 Neb., 756.) And when a new trial is sought, after the term, by a plaintiff, it must appear that he has a valid cause of action. (*Proctor v. Pettitt*, 25 Neb., 96; *Thompson v. Sharp*, 17 Neb., 69.) Since the application for a new trial fails to disclose that plaintiff has any cause of action against the defendant, the district court did not err in sustaining the demurrer.

The litigation concerning the horse in controversy, "now in the land of shadows,"—so we are advised by the very interesting and able brief of counsel for defendant,—has been protracted and varied. To this plaintiff it has been both expensive and fruitless, and having failed to obtain relief in equity, as well as at law, may we express the hope that the poor old horse may never be the subject of further investigation before any earthly tribunal.

AFFIRMED.

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158	507

STATE INSURANCE COMPANY OF DES MOINES,
IOWA, v. NEW HAMPSHIRE TRUST COMPANY.

FILED FEBRUARY 4, 1896. No. 6033.

1. **Insurance: MISREPRESENTATIONS.** A representation in an application for insurance that no other insurance existed on the property, is not to be deemed false in such a sense as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effects other insurance thereon in his own favor.
2. ———: ———. Where the application for insurance, and the policy issued thereon by an insurance company doing business in a sister state bear the same date, it will not be inferred in the absence of evidence upon that point, that the officers of the insurance company at its home office were influenced by misrepresentations contained in the application to approve a risk, which, had they known of such misrepresentation, they would not have approved.
3. ———: ———: **RIGHTS OF MORTGAGEE.** Where, by the terms of the policy of insurance, the loss, if any, is payable to a mortgagee as his interest appears at the time of the loss, the right of such mortgagee to maintain an action for such loss is not necessarily defeated by such misrepresentation in the application for insurance, as, by the terms of the contract between the insurer and the insured, would defeat the right of the insured to maintain an action on his own behalf.

ERROR from the district court of Seward county.
Tried below before BATES, J.

See opinion for statement of the case.

Charles Offutt, for plaintiff in error:

The policy was forfeited by taking subsequent insurance on the same premises. (2 May, Insurance [2d ed.], sec. 364; *Phoenix Ins. Co. v. Copeland*, 8 So. Rep. [Ala.], 48; *German Ins. Co. v. Heiduk*, 30

Neb., 288; *Reed v. Equitable Fire & Marine Ins. Co.*, 24 Atl. Rep. [R. I.], 833; *Zimmerman v. Home Ins. Co.*, 42 N. W. Rep. [Ia.], 462.)

The policy was forfeited by an undisclosed mortgage existing at the time of the application. (1 Wood, Fire Insurance, sec. 168; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Hutchins v. Cleveland Mutual Ins. Co.*, 11 O. St., 477; *Hayward v. New England Mutual Fire Ins. Co.*, 10 Cush. [Mass.], 444; *Brown v. People's Mutual Ins. Co.*, 11 Cush. [Mass.], 280; *Jacobs v. Eagle Mutual Fire Ins. Co.*, 7 Allen [Mass.], 132; *Falis v. Conway Mutual Fire Ins. Co.*, 7 Allen [Mass.], 46; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis., 671; *Smith v. Columbia Ins. Co.*, 17 Pa. St., 253; *O'Brien v. Home Ins. Co.*, 79 Wis., 399; *Addison v. Kentucky & Louisville Ins. Co.*, 7 B. Mon. [Ky.], 470; *Westchester Fire Ins. Co. v. Weaver*, 70 Md., 536; *Patten v. Merchants & Farmers Mutual Fire Ins. Co.*, 38 N. H., 338.)

The policy was forfeited by the fact that the insured, Brown, held only the naked legal title, while the real and beneficial owner was Haselwood. (*Farmers & Drovers Ins. Co. v. Curry*, 13 Bush [Ky.], 312; *Miller v. Amazon Ins. Co.*, 46 Mich., 463; *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass., 431; *Garver v. Hawkeye Ins. Co.*, 69 Ia., 202; *Davis v. Iowa State Ins. Co.*, 67 Ia., 494; *Westchester Fire Ins. Co. v. Weaver*, 17 Atl. Rep. [Md.], 401; *Dowd v. American Fire Ins. Co. of Philadelphia*, 41 Hun [N. Y.], 139; *McLeod v. Citizens Ins. Co.*, 3 Rus. & C. [N. S.], 156; *Ross v. Citizens Ins. Co.*, 19 N. B., 126; *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla., 399; *Brown v. Commercial Fire Ins. Co.*, 86 Ala., 189; *Wineland v. Security Ins. Co.*, 53 Md., 276; *Waller v. Northern Assurance Co.*, 10 Fed. Rep., 232; *McFet-*

ridge v. Phœnix Ins. Co., 54 N. W. Rep. [Wis.], 326; *Mt. Leonard Milling Co. v. Liverpool & London & Globe Ins. Co.*, 25 Mo. App., 259; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn., 440; *Crescent Ins. Co. v. Camp*, 71 Tex., 503; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich., 346; *Agricultural Ins. Co. v. Montague*, 38 Mich., 548.)

The policy was forfeited by using the insured building as a military armory, drill room, and storage depot. (*Kuntz v. Niagara District Fire Ins. Co.*, 16 U. C. C. P., 573; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Hobby v. Dana*, 17 Barb. [N. Y.], 111; *Hervey v. Mutual Fire Ins. Co.*, 11 U. C. C. P., 394; *Mooney v. Imperial Ins. Co.*, 3 Mont. Sup. Ct., 339; *Kyte v. Commercial Union Assurance Co.*, 21 N. E. Rep. [Mass.], 361.)

C. E. Holland, contra.

References to question of subsequent insurance: *Niagara Fire Ins. Co. v. Scammon*, 28 N. E. Rep. [Ill.], 919; 2 May, Insurance, sec. 372; 2 Wood Insurance, sec. 377; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y., 235; *Burton v. Gore District Mutual Ins. Co.*, 14 U. C. Q. B., 342.

References to question relating to undisclosed mortgages: *Wilson v. Minnesota Farmers Mutual Fire Association*, 36 Minn., 112; *Bartlett v. Firemen's Fund Ins. Co.*, 77 Ia., 155; *Breckinridge v. American Central Ins. Co.*, 87 Mo., 62; *Phœnix Ins. Co. v. La Pointe*, 118 Ill., 384; *Harriman v. Queen Ins. Co.*, 49 Wis., 71; *Fame Ins. Co. v. Mann*, 4 Bradw. [Ill.], 485; *Wheeler v. Traders Ins. Co.*, 62 N. H., 326; *Ayres v. Home Ins. Co.*, 21 Ia., 185; *German Ins. Co. v. Miller*, 39 Ill. App., 633; *Leach v. Republic Fire Ins. Co.*, 58 N. H., 245; *McNamara v. Dakota Fire &*

Marine Ins. Co., 47 N. W. Rep. [S. Dak.], 288; *People's Mutual Fire Ins. Co. v. Bowersox*, 5 O. C. C., 444; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App., 484; *Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barb. [N. Y.], 191.

References to the question relating to the use of the insured building as a military armory, drill room, and storage depot: *Thayer v. Providence-Washington Ins. Co.*, 70 Me., 531; *Stennett v. Pennsylvania Fire Ins. Co.*, 68 Ia., 674; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo., 435; *Anthony v. German-American Ins. Co.*, 48 Mo. App., 65; *Hahn v. Guardian Assurance Co.*, 32 Pac. Rep. [Ore.], 683; *Williams v. People's Fire Ins. Co.*, 57 N. Y., 274; *Gamwell v. Merchants & Farmers Mutual Fire Ins. Co.*, 12 Cush. [Mass.], 167; *Lattomus v. Farmers Mutual Fire Ins. Co.*, 3 Hous. [Del.], 404.

There cannot be fraudulent concealment where an applicant for insurance is not questioned as to the contents of the application. (*Campbell v. American Fire Ins. Co.*, 40 N. W. Rep. [Wis.], 661; *Dohn v. Farmers Joint-Stock Ins. Co.*, 5 Lans. [N. Y.], 275.)

Though the facts were sufficient to constitute a forfeiture, if the agent knew the facts when he issued the policy, the company is estopped from setting up the same as a defense. (*Commercial Ins. Co. v. Ives*, 56 Ill., 402; *Home Mutual Fire Ins. Co. v. Garfield*, 60 Ill., 124; *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev., 174; *Planters Mutual Ins. Co. v. Deford*, 38 Md., 382; *Field v. Ins. Co. of North America*, 6 Biss. [U. S.], 121; *Russell v. State Ins. Co.*, 55 Mo., 585; *Michigan State Ins. Co. v. Lewis*, 30 Mich., 41; *Richards v. Washington Fire & Marine Ins. Co.*, 60 Mich., 420; *Andes Ins. Co. v. Shipman*, 77 Ill., 189; *Lycoming Ins. Co. v. Jackson*, 83 Ill., 302; *Liverpool, London & Globe Ins. Co. v.*

McGuire, 52 Miss., 227; *Carr v. Hibernia Ins. Co.*, 2 Mo. App., 466; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289; *Mers v. Franklin Ins. Co.*, 68 Mo., 127; *Weeks v. Lycoming Fire Ins. Co.*, 7 Ins. L. J. [Vt.], 552; *Siltz v. Hawkeye Ins. Co.*, 16 Ins. L. J. [Ia.], 106; *Graham v. Ontario Mutual Ins. Co.*, 14 Ont., 358; *Gould v. Dwelling-House Ins. Co.*, 134 Pa., 570; *Planters & Merchants Ins. Co. v. Thurston*, 93 Ala., 255; *Pelzer Mfg Co. v. Sun Fire Office*, 15 S. E. Rep. [S. Car.], 562; *Jemison v. State Ins. Co.*, 52 N. W. Rep. [Ia.], 185; *Mowry v. Agricultural Ins. Co.*, 18 N. Y. Sup., 834; *Soli v. Farmers Mutual Ins. Co.*, 52 N. W. Rep. [Minn.], 979.)

RYAN, C.

There was a verdict, with a judgment thereon, for the defendant in error in this case, in the district court of Seward county. This judgment, on March 24, 1892, was rendered for the sum of \$2,124 and costs. The policy upon which plaintiff in error was found liable was issued to J. D. Brown on March 15, 1890. The property insured—a brick building—was totally destroyed by fire on January 16, 1891. The defenses specially pleaded were that in the application for the above insurance it had been falsely represented that Brown was the sole, undisputed owner of the property to be insured; that, likewise, it was falsely represented that there was no other insurance on the property; that in said application it was falsely represented that the building to be insured was used solely as a livery barn, whereas, in fact, the upper story thereof was used for an armory; and that by the said application there had not been disclosed the existence of a mortgage upon the premises therein described. These averments of the answer were

supplemented by others to the effect that the plaintiff in error had been deceived by the above described false representations and omission, and so had been induced to insure the property described.

In respect to the alleged false representations as to the ownership of the insured property, the bill of exceptions shows that there was introduced in evidence the record of a warranty deed from James A. Haselwood and his wife to the aforesaid Brown, whereby was conveyed the real property on which was the insured building. The plaintiff in error offered the above named James A. Haselwood as a witness, and from him elicited the oral statements that the above deed was a trust deed; that the witness still owned in fee-simple the property therein described; and that he had held possession of, and had collected the rents arising from, the said property ever since the making of the aforesaid conveyance. It would be extremely dangerous for this court to assume, upon evidence of this nature, that the jury wrongfully found that the deed attacked was operative according to its terms. The policy sued upon provided that the loss, if any occurred during the term covered by it, should be payable to the New Hampshire Trust Company, mortgagee, as its interest might appear at the time of such loss. When the policy sued upon was applied for and issued, there was in existence no policy of insurance upon the same property, but, something like nine months afterward, James A. Haselwood procured to be issued by the Farmers & Merchants Insurance Company of Lincoln another policy in his own favor. This last policy was of the date of June 11, 1891. The warranty deed above referred to had been executed by

James A. Haselwood and his wife on February 25, 1889, and had been filed for record two days thereafter; so that, if this deed was effective to pass title, as the jury must have assumed that it was, Mr. Haselwood, at the time he procured the insurance in his own favor, had no interest whatever in the property insured. It was not shown that Brown was at all cognizant of Haselwood's attempt to effect insurance in his own behalf, much less does the evidence disclose any approval of this attempt; hence Brown's rights were not impaired by it.

By the failure in the application to state that the building was used for an armory there was no such prejudice as was pleaded in respect thereto; for it was proved beyond question that in the armory there were kept no explosives or inflammable substances, and the keeping of these in said armory was what in the answer was alleged to have increased the risk. The testimony of insurance agents, that armories are usually classified as extra hazardous risks, was simply as to their judgment of what the action of insurance companies, ordinarily, would be in case such a risk was offered. In this case the written application, in which the building to be insured was described as a livery barn, was introduced in evidence. If this application could have subserved any purpose in procuring the issuance of a policy, it must have been, if this *quasi*-expert testimony was material, by influencing the officers of the company, at Des Moines, to accept the proffered risk. There was no attempt to show that the policy was issued by reason of the presentation of this application at the home office; hence there was no competent proof that the alleged misdescription therein was misleading

in view of the testimony of the aforesaid insurance agents. The averment of the answer that, without consent of the plaintiff in error, the upper story of the insured building was in January, 1891, and up to the time of the fire, changed so as to become an armory, had no support in the evidence. It was shown, beyond question, that this use as an armory existed from the erection of the building in 1887; hence the sole question presented on this branch of the case by pleadings and evidence has already been disposed of by the above discussion.

The mortgagee, to whom was payable the loss by the terms of the policy, was the original plaintiff in this case. The amount secured to be paid to this mortgagee was \$2,000, with interest thereon. This mortgage was dated March 13, 1888, and it was filed for record the day following. The mortgage, which was not disclosed in the application for insurance, was made to J. H. Culver on March 13, 1888, to secure the payment of \$755. This mortgage was filed for record on March 23, 1888. The application, from which was omitted all mention of this last named mortgage, was dated March 15, 1890, and the policy thereon claimed to have issued was of the same date. The only mention of the defendant in error to be found in all these insurance transactions occurs in the policy sued upon, and is in the following words: "Loss, if any, is payable to the New Hampshire Trust Company, mortgagee, as their interest may appear at the time of loss." In this policy it was provided with respect to mortgaged premises that, "if the same or any part thereof is incumbered by mortgage, lien, contract of sale, or otherwise, * * * or any existing incumbrance at the time of making application is not set forth in the application,

* * * then, and in every such case, this policy shall be void." In *Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb., 834, it was held that by issuing a policy of insurance an insurer was bound to make good such loss and damage as should be caused to the insured property by fire, but that the conditions upon which the payment should be made, as between the insurer and the insured, did not necessarily qualify the right of mortgagee to collect payment under a mortgage slip, which provided that the payment of loss should be made to such mortgagee as his interest appeared at the time of such loss. Under such a provision the contract of insurance, in so far as it related to the right of a mortgagee to recover, was held to be a separate and independent contract from the one which governed the right of the insured in that respect, and the cases cited fully sustain this distinction. It therefore results from the doctrine of the case last cited that the right of the defendant in error to recover the amount of loss as its interest as mortgagee was, at the time of the fire, not defeated by the fact that, as between the insurer and the insured, there had been an omission in the application to describe or refer to the mortgage to Culver, or by the fact that there was a like omission of mention of the use of the building for an armory. In this connection it is deemed appropriate to observe that the evidence justified the amount of the verdict returned by the jury, for there was due as interest the amount of the verdict in excess of \$2,000. There is presented by the record no other questions which we can examine, for, if upon the instruction there were such questions, they could not be considered, on account of the manner in which the instructions

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are grouped in the petition in error. The judgment of the district court is

AFFIRMED.

PER CURIAM.*

Upon consideration of a motion for a rehearing there was found in the brief submitted by the plaintiff in error such weight of argument that, without receding from the views expressed in the opinion as to the analogy afforded by the case of *Phoenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb., 834, it is by the court deemed advisable to say that this question will be determined as an original one whenever its consideration becomes necessary. The motion for rehearing is overruled, however, because from what has been noted in the opinion it is evident that the application for insurance in no degree influenced the issue of the policy, and hence the representation as to the non-existence of a mortgage on the insured property was immaterial.

REHEARING DENIED.

A. B. SANDERS V. WILLIAM WEDEKING ET AL.

FILED FEBRUARY 4, 1896. No. 6105.

Negotiable Instruments: INDORSEE: NOTICE OF USURY: REVIEW. The special verdicts in this case are found upon examination to be sustained by sufficient evidence. The judgment upon a general verdict, in accord with the special findings, is affirmed.

ERROR from the district court of Fillmore county. Tried below before HASTINGS, J.

*April 21, 1896.

J. D. Pope, for plaintiff in error.

Billings & Billings and *O. M. Quackenbush*, contra.

RYAN, C.

This action was brought by plaintiff in error as indorsee upon a promissory note for \$200 made by the defendants in error to the People's Bank of Tobias. The defense of usury was sustained by the findings and verdict of the jury, and the sole question presented for our determination is, whether or not these findings and this judgment adverse to the plaintiff in error were sustained by sufficient evidence. When the note was given, Worden A. Sanders, a son of the plaintiff in error, was assistant cashier of the bank above named, though it appears that his duties as such assistant cashier admitted of his devoting attention to his trade of a jeweler in a building different from that in which the banking business was conducted. He was, however, in the bank when the cashier, Stanley Larsen, made the loan to the defendants in error, which is conceded, in its inception, to have been usurious. It was the custom of this bank to loan at usurious rates, and the assistant cashier was aware of this, for, upon being asked at what rate this bank made loans, he told one of the defendants in error that it was two per cent a month on short time, but that if a man took lots of money for six months, it would be cheaper. When the cashier of the bank was arranging for this particular loan, the assistant cashier was near by in the same room, and, as one of the defendants testified, he was within hearing distance of the conversation, carried on, as it was, in an ordinary tone of voice by each party. Immediately after this note

was taken, it was transferred by the following indorsement: "Pay to A. B. Sanders, without recourse on me. Stanley Larsen, Cas." The payment for the transfer of this note, it was testified without contradiction, was made by Worden A. Sanders. Whether this payment was with his own means, whereby he became the owner of this note and afterwards transferred it to his father, or whether he bought with means of his father in his hands, were propositions contested and submitted to the jury, which by special verdict found the latter established by the proofs. The fact that the indorsement was made by the cashier directly to A. B. Sanders would seem entitled to some weight, as indicating that in this purchasing Worden A. Sanders was acting as the agent of his father. He, however, denied that this was the case, and testified that his father had loaned him \$600 to be reloaned by Worden as his own, and that having bought this note with a part of this money, he caused it to be indorsed to his father, direct, in part payment of said \$600 which he was owing.

D. H. Conant, who was county judge when the case was tried in the county court, testified in the district court that, on the trial before him, plaintiff in error had testified that his son had purchased the note for the plaintiff in error. In this Mr. Conant was corroborated by one of the defendants in error. On these two propositions of facts—First, that Worden A. Sanders, at the time of the purchase of the note, had knowledge of such facts that the defense of usury against him could properly be shown; and, second, that this bound his father, for whom he was acting as agent—there was sufficient evidence to sustain the verdict of

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the jury. There is presented by the record no other question, and the judgment of the district court is

AFFIRMED.

COLUMBUS C. WELLS V. STATE OF NEBRASKA.

FILED FEBRUARY 4, 1896. No. 8135.

1. **Instructions: ASSAULT.** To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but in addition it is requisite that such propositions be applicable to facts, at least in some degree, inferable from the evidence.
2. **Conviction for Assault.** Evidence examined and found sufficient to sustain the verdict.

ERROR from the district court of Richardson county. Tried below before BUSH, J.

Reavis & Reavis, for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state.

RYAN, C.

Plaintiff in error was, by a jury, found guilty of an assault in manner and form as charged in the information. This information was filed in the district court of Richardson county, and thereby the offense charged was that Columbus C. Wells, "upon one Oscar Larabee, then and there being, unlawfully, purposely, feloniously, and of his deliberate malice, did make an assault with a dangerous weapon, to-wit, a hammer, * * * with

intent * * * and thereby him, the said Oscar Larabee, unlawfully, purposely, feloniously, and of his deliberate malice, to inflict upon said Oscar Larabee great bodily injury," etc.

In the brief submitted on behalf of the plaintiff in error there are argued but two questions. Of these, one is that the verdict is not sustained by sufficient evidence. There is no room for doubt that Wells struck Larabee, at least twice, with a hammer, at the time and place described in the information. That there was such provocation that Larabee would have been entitled to but little sympathy if his punishment had been greater than it was, there can be no question; and yet this provocation was only by the use of insulting language, uttered at such a distance that it was necessary for the accused to take several steps that he might be able to show his resentment. When these steps had been taken it cannot be determined with certainty from the bill of exceptions which party first laid hands upon the other. There was sufficient evidence, however, to justify the jury in returning the verdict which it did return, and we cannot, therefore, set it aside as being without sufficient support.

In the brief the other ground of criticism is thus stated: "The court told the jury, in general terms, that they might convict the defendant of a simple assault, but failed to explain to the jury the legal meaning of the word 'assault' when used in that connection." One of the definitions of this word suggested by plaintiff in error is that given in Rapalje & Lawrence's Law Dictionary, to-wit: "In criminal law, assault is (1) an attempt unlawfully to apply any actual force, however small, to the person of another, directly or indi-

rectly; (2) the act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person." Counsel for plaintiff in error, in the course of their argument to establish their contention that the word "assault" should by the court have been defined without request, say: "Courts are supposed to know their duties,—a violent presumption in many cases,—and it is not incumbent on the defendant in a criminal case to ask the court to tell the jury what elements enter into a given transaction, as constituents thereof, to make it a crime." With the confident belief that we shall be able to show by a fair examination of the record that plaintiff in error has no just cause to complain that his rights were prejudiced by the district court in the trial of this case, we shall first consider the instruction which it is claimed should have been supplemented by a definition of the word "assault." It was in this language: "The court instructs the jury that, if they believe from the evidence beyond a reasonable doubt that defendant, not acting in self-defense, made an assault upon the prosecuting witness with the hammer, as alleged in the information, with no intention of feloniously inflicting great bodily injury upon the said prosecuting witness, then the jury may find the defendant guilty of an assault." As has already been stated, there was sufficient evidence to sustain the verdict of "guilty of an assault in manner and form as charged in the information." The evidence shows that plaintiff in error struck the prosecuting witness, at least twice, with a hammer. There were, therefore, no such conditions shown by the proofs that, under

the above quoted definition, a mere assault could have been inferred. If, under these conditions, the court had instructed the jury, as it is contended on behalf of the defendant in error that it should have done, following most text-writers, there would have been given an instruction to the effect that "an assault is the unlawful attempt, coupled with the present ability, to do injury to another." As this definition was not applicable to the facts proved, in any view of the case, it was not erroneous to omit to give this or an equivalent instruction. An assault with intent to commit great bodily injury is punishable by imprisonment in the penitentiary for not less than one nor more than five years. (Session Laws, 1889, ch. 34, sec. 1.) Notwithstanding a verdict of guilty of the above described offense, the judgment of the court was that Columbus C. Wells pay a fine of \$15 and costs of the prosecution. For a mere assault it was discretionary with the court to impose a fine to the extent of \$100, or to commit the defendant to the county jail for a period not exceeding three months. A fine of but \$15 was certainly not excessive for a mere assault, and, no matter what instruction as to what constituted an assault might have been given, the jury could not have dealt as leniently with the prisoner as did the court in treating his offense as a mere assault. Whatever error was committed was not such as to afford plaintiff in error any just cause of complaint. The judgment of the district court is

AFFIRMED.

SAMUEL M. BARKER V. CHARLES K. DAVIES.

FILED FEBRUARY 4, 1896. No. 5997.

1. **Review: PLEADING: MOTION FOR NEW TRIAL.** By failure to mention, in a motion for a new trial the ruling upon a motion to make more specific and certain the averments of a pleading, the party complaining waives his right to have reviewed the ruling complained of.
2. **Sales: WAIVER OF STRICT PERFORMANCE: INSTRUCTIONS.** Instructions *held* correct, which, while recognizing a defendant's right to insist upon the strict performance of the terms upon which a sale of personal property was alleged to have been made, nevertheless, consistently with the evidence introduced, permitted the jury to consider whether or not such strict performance had been waived by the party sought to be charged.

ERROR from the district court of Merrick county.
Tried below before MARSHALL, J.

The facts are stated by the commissioner.

Albert & Reeder and Norval Bros. & Lowley, for plaintiff in error:

A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him and in plaintiff's favor be stated in the petition. (*Bell v. Sherer*, 12 Neb., 409; *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.)

If the defendant refused to take all the hay and straw, the plaintiff would be entitled to recover for what was actually delivered and proper damages, if any, sustained for breach of the contract in declining to take the rest. (*Wallingford v. Burr*, 15 Neb., 204; *Holmes v. Bailey* 16 Neb., 300; *Jeroulds v. Brown*, 15 Atl. Rep. [N. H.], 123.)

M. Whitmoyer and John Patterson, contra.

RYAN, C.

This action was brought in the district court of Merrick county by the defendant in error to recover the purchase price of certain produce sold to, and the reasonable value of certain services performed for, the plaintiff in error. There was an answer by which there were denied the purchase and delivery of the hay and straw hereinafter referred to, and in addition, by way of counter-claim, there was alleged a payment of \$96.05, as well as the existence of damages to the amount of \$100, caused by the alleged failure by plaintiff in error to cut and properly put up certain hay. By reply these affirmative matters were denied. There was a judgment in favor of defendant in error for the sum of \$197.82.

The first question argued involves the overruling of a motion to make more definite and certain the averments of the petition. As this ruling was not referred to in the motion for a new trial, it cannot now be considered.

In the petition it was alleged that the defendant in error had sold and delivered to plaintiff in error 100 tons of hay at the agreed price of \$2 per ton, and 70 tons of straw at the same price per ton. These items were controverted by a general denial contained in the answer. In respect to the hay and straw there seems to have been but little disagreement in the evidence that this was to be baled by the plaintiff in error, and that, after this baling was done, it was to be delivered on board the cars at a designated near-by railroad siding. It also seems clear that such of the hay as was baled was delivered as agreed. There was, however, quite a large amount of hay, and all the straw, which Mr.

Barker never had baled, it would seem, because he thought it was not fit for baling. There was ample evidence from which the jury was justified in finding that Mr. Barker used the unbaled part of the hay and straw in maintaining and caring for his stock, at a place where no railroad shipment was necessary. On this branch of the case the sole point made is indicated by the second instruction asked by the plaintiff in error, which was refused by the court. This instruction was in the following language: "The plaintiff claims, among other things, \$200 for 100 tons of hay which he alleges he sold and delivered to the defendant. If you find that this 100 tons of hay was a part of a larger amount, and that said 100 tons was not set apart or designated or separated from the balance of the said larger amount, and that only a part of said 100 tons was actually delivered according to the agreement, and for the amount so delivered he should be allowed \$2 per ton." This instruction was properly refused, for, though the defendant in error did not load on the cars a portion of the hay, this was solely due to the fact that this hay was not baled by the other party. There was no question of a *quantum meruit* made in the case. On the part of the defendant in error the claim was that he had sold 100 tons of hay at \$2 per ton. This was met by a simple denial. The proof was that \$2 per ton was the agreed price. For a failure to place on board the cars no counter-claim or rebate was urged. Under these circumstances we think the following instruction, though complained of by the plaintiff in error, embodied the correct principle applicable to the evidence as submitted to the jury:

"9. The jury is instructed that if, from the evi-

dence in this case, they believe that in the year 1889 plaintiff sold to the defendant 100 tons of hay in the stack for the agreed price of \$2 per ton, and that, by the terms of sale, defendant was to bale it, and the plaintiff, after such baling, was to haul it to the railroad station and put it on board the cars, and that thereafter the defendant, on receiving returns of the sale of the hay, was to pay for it; and if the jury further from the evidence believe that by the terms of sale the 100 tons sold formed a part of 165 tons, or any greater number of tons in stack, and that the particular stacks which the defendant was to get were not identified or separated from the other stacks, then the right to select the stacks sold was in the defendant, and if he afterwards selected the stacks which he would take, by using a part thereof, or otherwise marking the stacks, so as to identify them, then the property in the stacks so selected or marked would vest in the defendant, and he would be liable to pay the plaintiff therefor at the rate of \$2 per ton, although the hay was not baled by the defendant or hauled to the cars by the plaintiff. In such case the plaintiff would not be under obligation to haul it until it was baled. The defendant would be entitled to such time for baling as would be reasonably necessary for that purpose if no time was fixed by the terms of sale, and if a time was fixed, then such time should govern the time within which the baling was to be done. On the other hand, if the jury from the evidence believe that defendant made a selection of only a part of the 100 tons of hay, then he would only be liable to the plaintiff for the amount selected at the agreed price." It is unnecessary to quote the instruction given in relation to the straw, for the

principle stated therein was the same as is found in the above instruction relative to the hay.

To entitle himself to a credit of \$96.05 the plaintiff in error introduced in evidence a check signed by himself for said amount, payable to the defendant in error, across which were stamped by the drawee the words: "First National Bank. Paid March 29th, 1890. Columbus, Nebraska." There was in connection with this check but little satisfactory testimony given by Mr. Barker, who admitted that it was not charged to the defendant in error in his account with him, but said that when he began to look over his papers with reference to making a defense he found this particular check marked "paid," and he believed it to have been given in payment upon account with the defendant in error, but would not swear positively that such was the case. The testimony of the defendant in error and of Alfred Davies was that this check was made by Mr. Barker upon his own motion to C. K. Davies in payment for certain property purchased of Alfred, because Alfred was then a minor, and Mr. Barker did not wish to depend upon his indorsement as evidencing the receipt of the money by Alfred upon the said check. With the conclusion reached by the jury upon consideration of this evidence we cannot interfere.

It is urged that the verdict was not sustained by sufficient evidence, but in regard to this, also, we must disagree with the plaintiff in error. There was ample evidence showing that both the hay and the straw were taken and used by the plaintiff in error, and that the condition of payments was correctly shown by the proofs offered by the defendant in error. The judgment of the district court is therefore

AFFIRMED.

JOSEPH P. MANNING V. WILLIAM J. CONNELL ET AL.

FILED FEBRUARY 4, 1896. No. 6069.

47	83
62	848

Temporary Injunction: FINAL ORDER: REVIEW. The orders sought to be reviewed upon petition in error, being only for the dissolution of a temporary restraining order, and in denial of a temporary injunction, it is *held* that neither of these is a final order, and this proceeding is therefore dismissed. Following *Bartram v. Sherman*, 46 Neb., 713.

ERROR from the district court of Douglas county. Tried below before OGDEN, J.

David Van Etten, for plaintiff in error.

Connell & Ives, contra.

RYAN, C.

In the district court of Douglas county plaintiff obtained the following temporary restraining order: "Upon reading the petition of plaintiff in the foregoing action, duly verified, and for good cause shown, it is ordered that the application of the plaintiff, Joseph P. Manning, for an order of injunction as prayed in said action be, and the same is hereby, set for hearing on Saturday, the 21st day of January, 1893, at 10 o'clock in the forenoon of that day, or as soon thereafter as the same can be heard, at court room No. 1 at the court house in the said county of Douglas, and that notice of the hearing of this order be given to defendant by Thursday, January 19, 1893; and it is hereby further ordered by the court that a restraining order be, and the same is hereby, allowed, restraining and enjoining the said defendants, and their

agents, servants, employes, and representatives, as prayed in said petition, to be and continue in full force and effect until the hearing and final determination of the application of said plaintiff for said order of injunction herein, and until the further order of court in that regard, upon plaintiff executing an undertaking in the sum of \$500 as required by law." On hearing for the purposes in the above order indicated, the temporary restraining order was vacated and the temporary injunction prayed was refused and denied. By petition in error plaintiff seeks to have the above reviewed as final orders. The quotation of the entire restraining order, supplemented by a full description of the orders sought to be reviewed, shows that this case falls within the rule announced and enforced in *Bartram v. Sherman*, 46 Neb., 713. For the reason that, as indicated, the orders sought to be reviewed are not final, this proceeding is

DISMISSED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. MARILLA L. CROW, ADMINISTRATRIX.

FILED FEBRUARY 4, 1896. No. 6054.

1. **Carriers: SHIPPERS OF LIVE STOCK: PASSES: PERSONAL INJURIES.** A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and an instruction to the contrary effect was erroneous.
2. ———: ———: ———. One who ships cattle and undertakes, upon a pass given him for that purpose, to accom-

47	84
49	135
54	749
47	84
159	445

pany and care for his stock in transit does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking.

3. ———: ———: ———: NEGLIGENCE. In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under the arrangement above indicated, the question of the existence of negligence, such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact to be determined by the jury.

ERROR from the district court of Valley county.
Tried below before THOMPSON, J.

The opinion contains a statement of the case.

John M. Thurston, W. R. Kelly, and E. P. Smith,
for plaintiff in error:

Under the evidence there was no breach of legal duty by defendant below towards plaintiff's intestate, and the injury from which he died was caused by his own negligence proximately contributing thereto. It was error to refuse to direct a verdict for defendant. (*Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Missouri P. R. Co. v. Moseley*, 57 Fed. Rep., 922; *Burns v. Boston & L. R. Co.*, 101 Mass., 50; *Clark v. Boston & A. R. Co.*, 128 Mass., 1; *Allyn v. Boston & A. R. Co.*, 105 Mass., 77; *Pennsylvania R. Co. v. Rathgeb*, 32 O. St., 66; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95; *Durrell v. Johnson*, 31 Neb., 796; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 317.)

There was error in the fifth instruction given by the court. (Wood, *Railway Law*, p. 1075; *Shoemaker v. Kingsbury*, 12 Wall. [U. S.], 376; *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. [U. S.], 503.)

At the time of the death of deceased the com-

pany owed him no duty as a passenger. Negligence on part of defendant below in violation of its general duty to the public was not shown, and the company should not be held liable. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *State v. Grand Trunk R. Co.*, 58 Me., 176; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Atchison & N. R. Co. v. Loree*, 4 Neb., 446; *Omaha & R. V. R. Co. v. Clark*, 35 Neb., 867; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Hyde v. Missouri P. R. Co.*, 110 Mo., 272; *Louisville & N. R. Co. v. Melton*, 2 Lea [Tenn.], 262.)

References to the question of contributory negligence: *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295; *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis., 659; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 657; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 195; *Myers v. Baltimore & O. R. Co.*, 150 Pa. St., 386; *Artz v. Chicago, R. I. & P. R. Co.*, 34 Ia., 153; *Pleasants v. Fant*, 89 U. S., 121; *O'Donnell v. Missouri P. R. Co.*, 7 Mo. App., 190.

A drover in charge of live stock travels under restrictions not applicable to ordinary passengers. His contract to care for the stock limits the liability of the carrier, and he assumes the risk ordinarily incident to such employment. (2 Am. & Eng. Ency. Law, 743, note 8; *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo., 268; *Cragin v. New York C. R. Co.*, 51 N. Y., 61; Hutchinson, Carriers [2d ed.], sec. 322; *Toledo, W. & W. R. Co. v. Black*, 88 Ill., 112; *Connelly v. Eldridge*, 36 N. E. Rep. [Mass.], 469; *Degg v. Midland R. Co.*, 2 H. & N. [Eng.], 773*; *Althorff v. Wolfe*, 22 N. Y., 355; *Mayton v. Texas & P. R. Co.*, 63 Tex., 77; *Wright v. London & N. W. R. Co.*, 1 Q. B. Div. [Eng.], 252; *Plant v. Grand Trunk R. Co.*,

27 Q. B. [U. C.], 78; *Searle v. Lindsay*, 11 C. B., n. s. [Eng.], 429; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49; *Baltimore & O. R. Co. v. Baugh*, 149 U. S., 368; *Brown v. Winona & St. P. R. Co.*, 27 Minn., 162; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Wilson v. Winona & St. P. R. Co.*, 37 Minn., 326.)

A drover in charge of live stock who uses a pass issued upon the condition that he will bear all the risks of transportation cannot maintain an action for personal injury received by the negligence of the carrier's servants. (*Gallin v. London & N. W. R. Co.*, 10 L. R., Q. B. [Eng.], 212; *Alexander v. Toronto & N. R. Co.*, 35 Q. B. [U. C.], 453; *Wells v. New York C. R. Co.*, 24 N. Y., 181; *Perkins v. New York C. R. Co.*, 24 N. Y., 196; *Bissell v. New York C. R. Co.*, 25 N. Y., 442; *Poucher v. New York C. R. Co.*, 49 N. Y., 263; *Annas v. Milwaukee & N. R. Co.*, 67 Wis., 46.)

The contract by which a party assumes the risk of injuries from the negligence of servants to another, indorsed on a free pass, issued without other consideration than that expressed in the written instrument, is not against public policy, and is binding on the person accepting and agreeing to the same, in the absence of willful or gross negligence on part of the carrier or its employes. (*Wescott v. Fargo*, 61 N. Y., 542; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y., 485; *Arnold v. Illinois C. R. Co.*, 83 Ill., 273; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill., 80; *Western & A. R. Co. v. Bishop*, 50 Ga., 465; *McCawley v. Furness R. Co.*, 8 L. R., Q. B. [Eng.], 57; *Hall v. North Eastern R. Co.*, 10 L. R., Q. B. [Eng.], 437; *Duff v. Great Northern R. Co.*, 4 L. R. [Ir.], 178; *Alexander v. Wilmington & R. R. Co.*, 3 Strob. Law

[S. Car.], 594; *Smith v. New York C. R. Co.*, 24 N. Y., 222; *Magnin v. Dinsmore*, 56 N. Y., 168; *Kinney v. Central R. Co.*, 32 N. J. Law, 407; *Griswold v. New York & N. E. R. Co.*, 53 Conn., 371; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va., 556.)

Reese & Gilkeson, contra:

Deceased was a passenger and entitled to all the rights and protection of a passenger for hire at the time he was killed, and the release upon the back of the ticket was void and of no effect. (*New York C. R. Co. v. Lockwood*, 17 Wall. [U. S.], 357; *Steamboat New World v. King*, 16 How. [U. S.], 469; *Philadelphia & R. R. Co. v. Derby*, 14 How. [U. S.], 485; *Missouri P. R. Co. v. Ivey*, 9 S. W. Rep. [Tex.], 346; *Receivers International & G. N. R. Co. v. Armstrong*, 23 S. W. Rep. [Tex.], 236; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St., 315; *Little Rock & F. S. R. Co. v. Miles*, 40 Ark., 298; *Carroll v. Missouri P. R. Co.*, 88 Mo., 239; *Ohio & M. R. Co. v. Selby*, 47 Ind., 471; *Flinn v. Philadelphia, W. & B. R. Co.*, 1 Hous. [Del.], 471; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind., 493; *Wilton v. Middlesex R. Co.*, 125 Mass., 130; *Siegrist v. Arnot*, 10 Mo. App., 197; *Jacobs v. St. Paul & C. R. Co.*, 20 Minn., 125; *Washturn v. Nashville & C. R. Co.*, 3 Head [Tenn.], 638; *Delaware L. & W. R. Co. v. Ashley*, 67 Fed. Rep., 209; *Rose v. Des Moines V. R. Co.*, 39 Ia., 246; *McLean v. Burlank*, 11 Minn., 288; *Cleveland, P. & A. R. Co. v. Curran*, 19 O. St., 1; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463.)

A person, standing in the proper place, under the circumstances, upon the premises of a railroad company, awaiting an opportunity to board his train, is still a passenger, and the railroad com-

pany is bound to use the same care and caution as to his safety, and is under the same obligation to him as if he were in the car in which he is to be transported. (*Warren v. Fitchburg R. Co.*, 8 Allen [Mass.], 227; *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann., 777; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass., 207; *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y., 355; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind., 568; *Dice v. Willamette Transportation Co.*, 8 Ore., 60; *Gordon v. Grand Street & N. R. Co.*, 40 Barb. [N. Y.], 546; *Caswell v. Boston & W. R. Co.*, 98 Mass., 194; *Central R. Co. v. Perry*, 58 Ga., 461.)

The question of negligence was for the jury to determine from the evidence. (*Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448.)

Charles A. Munn, also for defendant in error.

RYAN, C.

In the district court of Valley county there was recovered a verdict in the sum of \$5,000, upon which judgment was rendered in favor of the defendant in error. In describing the pleadings and the proceedings in the district court, it will probably avoid confusion to designate the parties according to their relation to the suit in that court, rather than as each is plaintiff in error, or defendant in error, in this court.

The plaintiff, Marilla L. Crow, in her petition

alleged that she was the administratrix of the estate of Jonathan S. Crow, deceased; that the defendant was a common carrier of freight and passengers over a line of railroad between Ord and South Omaha, which it owned; that on March 3, 1892, the said defendant, in consideration of the receipt by it of \$126, paid by Jonathan S. Crow, undertook to ship three car loads of cattle and safely carry said Jonathan S. Crow from Ord to South Omaha, but that while said Jonathan S. Crow was being carried in pursuance of said undertaking, and while he was performing his duty in looking after and taking care of said cattle while they were being transported to South Omaha, the said defendant negligently and carelessly ran an engine against, upon, and over said Jonathan S. Crow, and thereby caused his death. There were described in the petition eight children of said decedent, who survived him, and it was alleged that these survivors and the widow of Jonathan S. Crow had sustained damages by his death in the sum of \$5,000, for which sum judgment was prayed. The answer was in denial of all the averments of the petition. At the commencement of the trial it was admitted in open court that the plaintiff was the duly qualified administratrix of the estate of Jonathan S. Crow; that said decedent left him surviving the widow and children described in the petition; that said widow and surviving children, at the time of said trial, were the heirs at law of said Jonathan S. Crow, and, as such, were entitled to the benefit of the statutes of Nebraska in that behalf enacted, and that this suit was instituted for their benefit under the statutes. It was also admitted that the age and physical condition of Jonathan S. Crow had been such, just before his

death, that, if plaintiff was at all entitled to recover, the verdict must be for \$5,000.

As the defendant offered no evidence whatever, there is but little room for disagreement as to the ultimate facts which must determine this error proceeding. On March 3, 1892, Jonathan S. Crow & Son shipped three car loads of cattle from Ord to South Omaha. For the purpose of taking care of these cattle, Jonathan S. Crow was permitted to accompany his cattle, and, accordingly, there was issued to him a ticket by its terms good only for a continuous passage on the same train. On the back of this ticket were printed conditions required to be, and which were, signed by Mr. Crow, whereby he assumed all risk of accidents, and agreed that the Union Pacific system should not, under any circumstances, be liable for damage of any kind, whether to himself or to the stock which he was to accompany. Under the repeated decisions of this court, we cannot think that this stipulation of release should cut any figure in this case. (*St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222.) There was shipped by the same train to South Omaha from Ord other car loads of stock, and these were accompanied by shippers who were neighbors and acquaintances of Mr. Crow. When the train reached Grand Island all these shippers left the caboose and sought to procure a lunch at what had formerly been a lunch stand near, or upon, the line of the Union Pacific railway. When, not being able to procure a lunch, these shippers sought their train, they found it had been placed in the freight yards of said Union Pacific railway, and that both the engine and the caboose had been therefrom de-

tached. It was conclusively shown in evidence that the only safe course open to them under the circumstances was to keep very close to their stock, so as to prevent any of the cattle from getting down in the cars, as they were liable to do. There was no notice usually given when a train like theirs would start, and often it happened that shippers would be compelled to wait for hours near their stock, or run the risk of being left whenever the caboose should be attached. It was testified by different witnesses, and not denied, that if a shipper was not ready to board the caboose immediately after it was attached, he was in imminent danger of being left, for the attaching of the caboose to the train was the signal for its immediate departure from Grand Island.

The testimony shows that the night of March 3, 1892, was dark and foggy at Grand Island; that there was a drizzling rain, and that the electric and other artificial lights had but little tendency toward overcoming the prevailing darkness. The train in which were the cars of stock accompanied by Mr. Crow and his friends was standing upon a track running nearly east and west. At a distance of about eight feet north of this track there was a parallel track, upon which was standing the way car which had been brought from Ord and detached from the cars which the stock shippers were watching. An engine backed along this track from the west and shoved the way car upon a switch. To accomplish this it was necessary to pass the stockmen, who were standing along the north side of one of their cars of stock. Across the rear of the tender of this engine there was a foot-board, which projected over the track about two feet, at a height of about

ten inches above the track traveled by the engine. The space between the cars which the stockmen were watching and the projecting end of the foot-board nearest them was about five feet across. It is not certain there was a light on the rear end of the tender. If there was such a light, its elevation was so great, or the light itself was so dim, that it gave no warning of the movements of the engine which we are about to describe. After the engine had shoved the way car upon the switch eastward, it moved westward beyond where the waiting stockmen were standing. No witness was able to say just how far westward this engine had proceeded before it made a stop and began backing eastward. It is disclosed by the evidence of the surviving stockmen that they first discovered this engine when, in backing eastward, it was within from five to ten feet of them. After this engine had passed westward these stockmen paid no attention to it, and Mr. Crow shifted his position slightly, so that when the engine, without warning given by bell, whistle, or otherwise, backed toward the east he was struck, thrown down, and killed. From the facts which we have detailed it was clearly made to appear that Jonathan S. Crow was properly alongside the car wherein the stock of himself, or of his friends, was contained. The district court, in respect to his relation to the railroad company, gave the instruction numbered five requested by the plaintiff, which was as follows: "The jury are instructed that a drover or a stockman, traveling on a pass, such as was given to Jonathan S. Crow, deceased, in this case, for the purpose of taking care of his stock on the train, is a passenger for hire, and is entitled to the same rights and privileges as other passengers for hire,

riding on ordinary railway tickets." It seems to us that this instruction overstates the liability of railway companies in the class of cases contemplated. An owner of stock, who, for the purpose of taking care of such stock, receives free transportation, does so under such conditions as the duty of caring for his stock may require. If he is entitled to the same rights and privileges as ordinary passengers for hire, he could scarcely be expected to be satisfied to ride in an ordinary caboose. The duty of a railroad company to stop its trains at passenger depots for the purpose of receiving passengers, and of permitting of their alighting safely, would exist under the above rule, and there would be devolved upon the passenger the correlative obligation of remaining at such depot until his train should stop at that place. In such case it would be absolutely impossible for a stockman to pass alongside the cars containing his cattle, and having discovered such as had fallen or lain down, assist them to regain their feet. In the case under consideration the testimony showed, without question, that this was exactly the duty of Mr. Crow in respect to the cattle which he was accompanying to South Omaha. The fact that he was in the freight yard of the railroad company looking after his cattle, and waiting for the departure of the train, is inconsistent with the rule above laid down by the court; for, if this rule was a correct statement of the law which should be held applicable to the facts disclosed by the evidence, Mr. Crow should have awaited the departure of his train at the passenger depot; and it was evidence of negligence for him to venture into the freight yard to care for his stock, or to take passage on his train. The court should have instructed the jury

that, whether or not the deceased was negligent in waiting for the caboose where he did, and whether or not he was guilty of negligence in any respect while so waiting, was a question of fact to be, by the jury, determined upon consideration of all the evidence.

On the part of the railroad company there were requested numerous instructions defining what facts, or group of facts, would constitute contributory negligence, and what enumerated facts would not justify the inference of negligence, among which latter was the failure to ring the bell, or to sound a whistle, within the limits of the freight yard. The refusal of the district court to follow this method of giving instructions has been by this court sanctioned in *Omaha Street R. Co. v. Craig*, 39 Neb., 601, and the Nebraska cases therein cited. Still later, the practice of instructing the jury that certain facts justify, or fail to justify, the inference of negligence has been disapproved in *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb., 578; *Pray v. Omaha Street R. Co.*, 44 Neb., 167; *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720. The utmost extent to which the district court could properly go was to indicate what facts, if proved, might properly be taken into consideration in determining the presence or absence of negligence. Whether or not the plaintiff's intestate was negligent in the performance of duties which the railroad company had acquiesced in his performing, was a question of fact which should have been submitted, as such, to the jury, in view of the evidence as to what such intestate, of necessity, was required to do, and how he was required to do it, in properly caring for his cattle. In our

First Nat. Bank of Wilber v. Ridpath.

view it was not proper to attempt to confer upon Mr. Crow the unlimited rights and privileges of ordinary passengers for hire. While he was for certain purposes a passenger, he was not such in the usual unrestricted sense of that term. His contractual right was to proceed upon the freight train upon which his cattle were shipped from Ord to South Omaha. His duty was to care for his stock in transit, and his rights and privileges as a passenger were limited by the necessity of traveling on the aforesaid freight train, and by the requirement that he should care for his stock. For the reason that, in the instruction quoted, this limitation and requirement, with all their necessary incidents, were ignored, the judgment of the district court is

REVERSED.

HARRISON, J., not sitting.

FIRST NATIONAL BANK OF WILBER V. J. W. RID-
PATH.

FILED FEBRUARY 4, 1896. No. 6026.

Principal and Agent: AUTHORITY: EVIDENCE: RATIFICATION.

When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and entrusted to the agent under similar circumstances.

ERROR from the district court of Saline county.
Tried below before BUSH, J.

J. H. Grimm and E. W. Metcalfe, for plaintiff in error.

References: Story, Agency, sec. 133; 1 Am. & Eng. Ency. Law, pp. 353-357; *British American Mortgage Co. v. Tibballs*, 63 Ia., 468; *Robinson v. Anderson*, 106 Ind., 152; *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370; *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 66; *Alexander v. Graves*, 25 Neb., 453; *Stump v. Richardson County Bank*, 24 Neb., 522.

Hastings & McGintie, contra.

IRVINE, C.

This was an action of replevin by the plaintiff in error against the defendant in error for certain live stock which the plaintiff in error claimed under a chattel mortgage executed by the defendant in error to Lytle & Maynard, to secure a note which had been sold by Lytle & Maynard to the plaintiff in error. There was a verdict and judgment for the defendant, which the plaintiff seeks to reverse.

The most important assignment of error is that the verdict is not sustained by the evidence. The evidence shows that Ridpath gave to Lytle & Maynard his promissory note for \$279.77, May 22, 1891, payable one month after date. This note was sold to the plaintiff bank, and was secured by chattel mortgage on the stock in controversy. Before the note became due it was sent to the Bank of Western by the plaintiff for collection. Lytle & Maynard were both officers of the Bank of Western. Maynard was its president. The evidence tends to show that instead of collecting the note the Bank of Western took a new note, again to the order of Lytle & Maynard, and a new mortgage on the same

property. Ridpath knew nothing of the plaintiff's ownership of the old note. It bears a general indorsement by Lytle & Maynard and nothing indicating its ownership. There is also evidence tending to show that the new note and mortgage passed into the possession of a third party, who endeavored to collect the debt. It also appears from the testimony of the cashier of the plaintiff bank that prior to this transaction the plaintiff had done a good deal of business with the Bank of Western and Lytle & Maynard, and it had been the plaintiff's custom to send notes purchased of Lytle & Maynard or the Bank of Western to the Bank of Western for collection; and that frequently, instead of collecting such notes, the Bank of Western had procured renewal notes and sent them to the plaintiff in lieu of payment. We think this evidence sustains the verdict. Where the authority of an agent is in issue, proof of the exercise by him, with the knowledge of the principal, of similar authority in past transactions may be material in two respects. In the first place, where notice is brought home to the person with whom a contract is made, such evidence tends to show that the agent was acting within the scope of his apparent authority, and so tends to bind the principal, even though actual authority in the particular instance be disproved. In the second place, the exercise of such authority in past transactions known to the principal tends to prove that in the particular transaction in question the agent possessed actual authority, there being no special instructions. Because where an agent under certain circumstances has been permitted to exercise a certain authority, the principal knowing the facts, and a similar transaction is entrusted to him under the same

circumstances as before, and without special instructions, the presumption is his authority is the same. In this case there is no evidence that this particular note was not sent under the same circumstances and with the same authority on the part of the Bank of Western which existed with regard to similar notes which had been sent it. Therefore the jury was justified in inferring from the fact that other notes sent by plaintiff to the Bank of Western had been satisfied by the taking of renewal notes therefor, that the Bank of Western had similar authority in this case. If such authority existed Ridpath should not suffer, if, as seems to be the case, the agent was dishonest and disposed of the new security to a stranger instead of sending it to its principal.

The foregoing considerations really dispose of the merits of the case. The giving of certain instructions requested by the defendant is assigned as error; but the assignment is directed *en masse* against the whole group of instructions, and some are manifestly correct. Error is also assigned upon the giving of the single instruction given by the court of its own motion. It will not be necessary to quote this instruction, because it is in accord with the rule we have already stated in considering the sufficiency of the evidence.

The admission in evidence of the second mortgage is assigned as error. The objection to its receipt was that it was incompetent, immaterial, and irrelevant. The instrument offered was one properly certified by the county clerk as a copy of the instrument on file in his office. It was therefore competent. (Code of Civil Procedure, sec. 408; Compiled Statutes, ch. 32, sec. 14.) It was relevant and material, because there was sufficient in the

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parol testimony to identify it as the mortgage which had been given in satisfaction of that on which plaintiff bases its claim.

An argument is made to the effect that no renewal of a mortgage debt, no matter in what form the new debt is evidenced, satisfies the mortgage; but here not only was the evidence of indebtedness changed, but a new security was taken, as the defendant testifies, in satisfaction of the old. This, no doubt, extinguished the existing mortgage.

JUDGMENT AFFIRMED.

HENRY MARTIN ET AL. V. A. AUGUSTA CLARKE.

FILED FEBRUARY 4, 1896. No. 6082.

Review: SUFFICIENCY OF EVIDENCE. This case presents only a question of fact. Evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Buffalo county.
Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiffs in error.

Calkins & Pratt, contra.

IRVINE, C.

The defendant in error brought this action against the plaintiffs in error, charging under one count that she had employed plaintiffs in error as her agents to purchase certain land for her; that they falsely represented to her that the lowest price for which the land could be obtained was

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\$5,000, and that she, relying on said representations, gave them \$5,000 wherewith to make the purchase; that in truth and in fact the price asked for said land was only \$4,000, whereby plaintiffs in error obtained and converted to their own use \$1,000. A second count of the petition charges other acts of fraud; but the court instructed the jury that the second count was not supported by the evidence, so we need not regard it. On the first count there was a verdict for defendant in error.

No complaint is made of any ruling of the district court upon a question of law. The instructions are admitted to be correct as statements of law. The argument of the plaintiffs in error is that the verdict is not sustained by the evidence in this: that the evidence fails to show that the plaintiffs in error were agents of or employed by the defendant in error at the time of the transaction complained of. In this particular it is also claimed that certain instructions should not have been given, because not based on any evidence. It will be fruitless to recite the evidence in this opinion, as the question is entirely one of fact. We have examined the record carefully, and think that while the evidence on the point in question is not direct or very strong, it is sufficient to justify the jury in finding that a fiduciary relationship existed between the parties.

JUDGMENT AFFIRMED.

JABEZ C. CROOKER, GUARDIAN, v. MARION W. C. SMITH.

FILED FEBRUARY 4, 1896. No. 6010.

1. **Guardian and Ward: REMOVAL OF GUARDIAN.** The county court has power to remove a guardian, upon notice, when he has become incapable of discharging his trust or evidently unsuited therefor. (Compiled Statutes, ch. 34, sec. 28.)
2. ———: ———. The disability justifying a removal need not be one arising after the appointment. A guardian may be removed whenever found unsuitable.
3. ———: ———. The word "unsuitable" in the statute applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests.
4. ———: ———. Corruption or malfeasance is not necessary to authorize the removal of a guardian. Evidence of a failure to properly protect the ward's rights is sufficient proof of "unsuitability."

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

Jabez C. Crooker, pro se.

References: Bingham, Law of Infancy, 172; *Rowan v. Kirkpatrick*, 14 Ill., 1; *Bond v. Lockwood*, 33 Ill., 212; *Davis v. Harkness*, 1 Gil. [Ill.], 173.

Abbott, Selleck & Lane, contra.

References: *In re Johnson*, 54 N. W. Rep. [Ia.], 69; Cooley, Torts, pp. 523, 525; Schouler, Domestic Relations, secs. 316, 348, 352, 354.

IRVINE, C.

This was a proceeding instituted in the county court of Lancaster county for the removal of

Jabez C. Crooker, who had theretofore been appointed guardian of the estate of Marion W. C. Smith, a minor. February 20, 1889, Crooker was appointed guardian, and May 20, 1890, a petition was filed in the county court charging that Crooker had failed to make a report, although he had sold real estate belonging to the ward. The prayer was for an order requiring the guardian to report and account. An order was made requiring the guardian to file his report on or before May 29. On May 28 the report was filed, and subsequently exceptions thereto were filed on behalf of the ward. June 26 there was filed on behalf of the ward a petition praying for the removal of the guardian, the charges made being, in brief, that the guardian had paid out the sum of \$103.25 of the ward's estate in discharge of a personal debt of one George D. Smith, and sought to charge the ward therefor; that the ward, although over the age of fourteen years when the appointment was made, and consenting thereto, had since found her relations with her guardian unpleasant, and that she wished him removed. On hearing by the county court it was found that the guardian had not reported in the time required by law; that he had paid out \$41.30 without authority of law; that the guardian, because of his age and temperament, was unsuitable for his trust; and that the ward complained of existing unpleasant relations; wherefore it was ordered that the guardian be removed and that his report be allowed except said sum of \$41.30. An appeal was taken to the district court, where the matter was again tried, with similar findings, except that the amount found to have been unlawfully paid out was \$56.75. A decree was there entered removing the

guardian and rendering judgment for the last named sum. The guardian prosecutes error.

It is first urged that the county court was without authority to remove the guardian; that is, that the proceedings were without jurisdiction. Section 28, chapter 34, Compiled Statutes, provides: "When any guardian, appointed either by the testator or court of probate, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the court, after notice to such guardian and all others interested, may remove him." This provision is in the chapter having reference to guardians and wards, and the court referred to, when taken with the context, is evidently the court which is now called the "county court," which has succeeded in probate matters and matters of this character to the jurisdiction of the probate court in existence when the statute was passed. The county court had jurisdiction, upon proper notice, to remove the guardian if he had become insane or otherwise incapable of discharging his trust or evidently unsuitable therefor. No question is raised in this case as to the sufficiency of the notice given. We think to construe the language as referring only to disabilities occurring after the appointment of the guardian would be to give it a construction at once strained and impolitic. It never could have been the intent of the legislature that a guardian once appointed should obtain an inalienable vested right to the office. He is an officer of the court charged with duties of a fiduciary character. It is the duty of the court to see that these duties are performed; and it is within the power of the court to remove an incompetent guardian in order to protect the estate of the ward, although such

incompetency existed at the time of the appointment.

The only other question in the case is whether the findings of the court were sustained by the evidence, and whether those findings show that the guardian was unsuitable for discharging his trust. Some of the facts are as follows: The ward was the daughter of George D. Smith and Marion Smith. Marion Smith was seized of a lot in the city of Lincoln. She died, and Crooker, with the consent of the ward,—but this consent obtained at the instance of her father, George D. Smith,—was appointed guardian. Five days thereafter he made application to the district court of Lancaster county to sell the lot in question, alleging that its improvements were in a dilapidated condition and in need of repairs; that there were delinquent taxes thereon; that no personal property had come into his hands, and that the funds to be realized from the sale were necessary for the education and maintenance of the ward. To this petition on the same day there was filed an answer by Smith admitting that the ward's mother had died seized of the title to the lot, but alleging that he had furnished the consideration money and that she held the title in trust for him. On March 3 a stipulation was filed, signed by Smith and by the guardian, whereby it was agreed that Smith had purchased and paid for the lot the title to which had been taken in the name of Smith's wife, the ward's mother; that the estate of the ward therein was two-fifths and that of Smith three-fifths; that a sale should be ordered and out of the proceeds there should be paid to the guardian for the ward two-fifths, and to Smith three-

fifths, less costs, taxes, and assessments. A license to sell was granted on that stipulation; but thereafter a motion was filed showing that the authority to sell on a license granted under such a stipulation was deemed by learned lawyers to be invalid, and that a sale could not be made thereon; wherefore it was stipulated that the license be set aside. Then Smith filed an amended answer claiming only as tenant by curtesy; and on this there was a hearing and license to sell given, fixing the interest of the ward at three-fifths and that of Smith at two-fifths, and directing that the costs, taxes, and assessments be paid out of the ward's share. The license authorized a private sale, and a sale was negotiated with one Veith for \$2,700. It was then discovered that there was of record a judgment against Smith for about \$280. A cancellation of this was procured for the sum of \$103.25. The lot was sold to Veith and the sale confirmed without any disclosure, so far as appears from the record, of the satisfaction of the judgment or its disposition. Veith paid \$1,500 in cash and gave two notes, one for \$200 and one for \$1,000, secured by mortgage, for the balance of the purchase money. Out of the cash payment the costs, taxes, and assessments, and the \$103.25 in satisfaction of the judgment were paid, and the remainder was paid to Smith in discharge of his two-thirds interest in the land. The \$103.25 was charged to the ward. The guardian retained the two notes and a very small balance in money, representing the ward's interest. Comment on these proceedings is hardly necessary. The guardian, in the first place, entered into a stipulation which he had no right to make, admitting facts which might de-

prive his ward of any beneficial interest in the land. The vice of this proceeding was so apparent that the parties thereto were compelled on their own motion to set it aside, because no one who took counsel on the matter would purchase the lot on such a record. The proceedings by which the ward's interest was finally determined, and the taxes and assessments ordered paid out of that interest, are not here reviewable; but in pursuance of those proceedings the guardian by private arrangement disposed of a portion of his ward's interest in the proceeds by discharging a judgment which was not even an apparent lien on his ward's estate. It was a judgment against Smith, in whom the title had never been, and could not be a lien unless it might be upon Smith's life estate. Having done this, while the proceedings were to obtain money for the maintenance and education of his ward, he gave practically all the money realized to the father in satisfaction of his life estate, and retained for his ward only the evidences of indebtedness. He failed within the time required by law to report these proceedings to the county court, and did not report at all until compelled by order of the court to do so.

From the brief filed by the guardian it is evident that he considers the findings of the county and district courts as equivalent to a conviction of corrupt practice on his part. The findings have no such effect, and this opinion has no such effect. The record merely shows that, perhaps through inadvertence or otherwise innocently, the guardian had failed to properly care for the interests of the ward. He had done several things to her disadvantage which he had no right to do. We

 Smith v. Jones.

think the word "unsuitable" in the statute is very broad in its meaning, and applies to every case where the guardian for any reason is shown not to be capable of or not in a situation to suitably protect his ward's interests. Judged by this test the evidence amply warranted the county and district courts in their findings.

JUDGMENT AFFIRMED.

**HUMPHREY SMITH, APPELLEE, V. JAMES B. JONES
ET AL., APPELLANTS.**

FILED FEBRUARY 4, 1896. No. 5996.

1. **Attorney and Client: RELEASE OF DEBTOR.** An attorney employed to collect a debt has not by virtue of his general employment authority to release a debtor except upon payment of the full amount of the debt in money.
2. ———: ———. Evidence examined, and *held* insufficient to authorize attorneys to make a contract as claimed by plaintiff for the release of a judgment.

APPEAL from the district court of Custer county. Heard below before NEVILLE, J.

Darnall & Kirkpatrick, for appellants.

O'Neill & Morgan, contra.

IRVINE, C.

This was an action by the appellee against Jones, the sheriff of Custer county, Foster, his deputy, and the Farmers & Merchants Insurance Company to restrain the defendants from the enforcement of a judgment of a justice of the

47	108
47	510
47	108
51	832

peace obtained by the insurance company against Smith. Relief against the judgment was sought on the ground that after the judgment was rendered (quoting the petition), "The Farmers & Merchants Insurance Company acknowledged the payment of said judgment and receipted for same in the following words and figures, to-wit:

" 'BROKEN BOW, Sept. 8, 1890.

Received of Humphrey Smith, two dollars, one-half costs Farmers & Merchants Insurance Co. v. Smith, also application for \$3,000 insurance, in consideration of which we agree to release judgment in this case.

" 'KIRKPATRICK & HOLCOMB,

" '*Attorneys for Plaintiff.*' "

The evidence shows that after the judgment was obtained an agreement was entered into between Smith and Kirkpatrick & Holcomb, attorneys for the insurance company, whereby the judgment was to be released on payment by Smith of one-half the costs, estimated at \$2, and the taking out of new insurance to the amount of \$3,000. Smith paid the \$2 and made application for insurance. The company wrote the policy and sent it to the attorneys, but it was never delivered to Smith, for the reason that he failed to pay the premium thereon. It will be observed that the instrument which plaintiff counts upon as evidence of the satisfaction of the judgment is not, in form, a release of the judgment, but an agreement to release, whether in consideration of the application for insurance or in consideration of the insurance is doubtful from the terms of the instrument. There is a conflict in the evidence as to whether the judgment was to be released on Smith's making application for the insurance, or

whether it was to be released only on his payment of the premium; but the evidence in support of the former view is very slight. In any event, the conflict is not material. The attorneys, by the undisputed evidence, had no express authority to release the judgment except upon the taking out of and paying for the new insurance. They merely had a general employment to collect the debt evidenced by the judgment; and the only subsequent authority obtained was through a letter inclosing the policy, with directions to collect the premium, and sent in response to a submission by the attorneys of a proposition to satisfy the judgment on the actual taking out of new insurance. The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only. (*Hamrick v. Combs*, 14 Neb., 381; *Stoll v. Sheldon*, 13 Neb., 207. See, also, *State Bank of Nebraska v. Green*, 8 Neb., 297, and *Luce v. Foster*, 42 Neb., 818.) If the agreement was as Smith claims, it was without authority on the part of the attorneys and was not ratified by the insurance company. It follows that the judgment of the district court granting an injunction as prayed by the plaintiff was erroneous.

REVERSED AND DISMISSED.

GEORGE T. HALL ET AL., APPELLANTS, V. EDWARD
HOOPER ET AL., APPELLEES.

47	111
54	152
47	111
61	91

FILED FEBRUARY 4, 1896. No. 6028.

1. **Quieting Title: PARTIES.** Any person claiming title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title. *Foree v. Stubbs*, 41 Neb., 271, followed.
2. ———: ———. Such an action may be maintained by a remainder-man during the continuance of the particular estate.
3. **Execution: VOID DECREE: QUIETING TITLE.** Where a judicial sale and conveyance of land have been made under a void decree, a court of equity will not give affirmative relief to the person whose estate was sought to be divested unless he shows some equitable interest in the land. *Hughes v. Housel*, 33 Neb., 703, followed.
4. **Mortgages: RIGHTS OF HOLDER OF NOTES.** The assignee of notes secured by mortgage, even though the assignment be without consideration, succeeds to the right of the mortgagee to have redemption made as a condition of canceling the mortgage. *Loney v. Courtney*, 24 Neb., 580, followed.
5. **Principal and Agent: RATIFICATION.** A principal who ratifies a contract made for him by another must adopt all the instrumentalities employed by such agent to bring it to a consummation. *Joslin v. Miller*, 14 Neb., 91, followed.
6. ———: ———: **HUSBAND AND WIFE.** Therefore, where A purchased land and caused it to be conveyed to his wife, he giving at the time of the conveyance a mortgage in own name upon the land to secure a portion of the purchase money, the wife, by accepting the deed, adopted also the mortgage. It became an equitable mortgage upon the land.
7. ———: ———: ———. The fact that the husband was not authorized in writing to act in the matter is immaterial. The statute of frauds is not applicable to such a case.

8. **Estoppel: CREDITORS' BILL: MORTGAGES.** A conveyance was made which was void as against creditors, and, as part of the same transaction, a purchase-money mortgage was executed on the same land. A creditor caused the land to be subjected to the payment of his judgment. A portion of the land was sold, completely satisfying the judgment. The former creditor afterwards became the assignee of the mortgage. *Held*, That he was not estopped by the creditors' bill and proceedings thereon from foreclosing the mortgage upon that portion of the land which had not been subjected to the payment of his judgment.
9. **Quieting Title: MORTGAGES: OFFER TO REDEEM.** A mortgagor, in order to remove the cloud cast upon his title by a sheriff's deed executed in pursuance of a void foreclosure, must offer to pay what is equitably due under the mortgage.
10. ———: ———: ———. When a mortgagor seeks such affirmative relief he is not relieved from the necessity of offering to redeem by the fact that the statute of limitations has barred the mortgagee's right to foreclose. *Merriam v. Goodlett*, 36 Neb., 384, followed.
11. **Limitation of Actions: MORTGAGES: BILL TO REDEEM.** The statute of limitations begins to run against a bill to redeem from the time when, the mortgage having matured, the mortgagee enters into open and notorious possession of the premises under claim of ownership.
12. ———. Whether the period of limitations in such case is four or ten years is not decided.
13. **Adverse Possession: MORTGAGES: SHERIFFS' DEEDS.** A mortgagee, under a mortgage purporting to incumber the fee, sought to foreclose against the fee, bought the land at the foreclosure sale, and the sheriff's deed purported to convey the fee and was immediately recorded. He entered into actual possession of the land. The foreclosure was void. The plaintiffs undertook to annul the deed. They were remainder-men after a life estate, the tenant of which was not a party to the suit. By their petition they admitted that the mortgagee had by the proceedings obtained the life estate; but the proof showed that the proceedings were void as to the life tenant as well as to the plaintiffs. *Held*, That the mortgagee's possession was adverse to the plaintiffs, and not merely for the life estate.

14. Limitation of Actions: MORTGAGES: OFFER TO REDEEM.

The plaintiffs having undertaken to have both the mortgage and proceedings to foreclose it declared void, and the court having determined that while the foreclosure was void the mortgage was not, an opportunity to amend the petition by offering to redeem was denied, the proof showing that the right to redeem was barred by the statute of limitations.

APPEAL from the district court of Hall county.
Heard below before HARRISON, J.

The issues are stated by the commissioner.

R. C. Glanville, R. R. Horth, and Charles G. Ryan,
for appellants.

References as to plaintiffs' right of action:
2 Washburn, Real Property, p. 495*; Tiedeman, Real Property, sec. 715; *Mettler v. Miller*, 129 Ill., 630; 1 Am. & Eng. Ency. Law, 237; *Ainsfield v. Moore*, 30 Neb., 385.

Reference as to construction and effect of the deed to Mrs. Milton S. Hall: *Dworak v. More*, 25 Neb., 735.

References as to the effect of judicial sales and sheriffs' deeds: *Lang v. Hitchcock*, 99 Ill., 550; *Mettler v. Miller*, 129 Ill., 630; *Kirk v. Bowling*, 20 Neb., 260; *Barrett v. Stradl*, 41 N. W. Rep. [Wis.], 439.

Abbott & Caldwell, contra.

References: *McKesson v. Hawley*, 22 Neb., 692; *Boyd v. Blankman*, 29 Cal., 19; *Moore v. Miller*, 43 Fed. Rep., 347; *Pope v. Hooper*, 6 Neb., 178; *Castner v. Walrod*, 83 Ill., 172; *Carson v. Murray*, 3 Paige Ch. [N. Y.], 483; *Blain v. Harrison*, 11 Ill., 384; *Learned v. Cutler* 18 Pick. [Mass.], 9; *Forbes v. Sweesy*, 8 Neb., 520.

IRVINE, C.

For a proper understanding of this case a statement of the substance of the pleadings is necessary. The appellants, George T. Hall and Mary J. Monroe, in their petition allege that one Mrs. Milton S. Hall was in her lifetime the owner in fee of certain land in Hall county; that she died seized of said land November 24, 1871, leaving surviving her her husband, Milton S. Hall, who is still living, and the plaintiffs, her only children by said Milton S. Hall; and that thereby Milton S. Hall became seized of an estate by curtesy in said premises, and the plaintiffs became owners in fee of the remainder. The petition then alleges certain proceedings and deeds in pursuance thereof, whereunder the defendant Hooper claims to have divested the estate and become the owner in fee of the land. These proceedings are pleaded at length. It is then alleged that all these proceedings were void as to the plaintiffs and their mother for want of jurisdiction of the person, and that they were of no effect to pass any title to Hooper except the life estate of Milton S. Hall, which has not yet been determined. The plaintiffs also aver that they had no notice of the claim of Hooper to the fee of the land until within two years of the commencement of the action. They allege that said proceedings and deeds constitute a cloud upon their title, and pray that the deeds be adjudged void in so far as they purport to convey the estate of the plaintiffs, and that title to the remainder be quieted in plaintiffs. There are certain other averments against the other defendants claiming under a mortgage from Hooper and leading to a prayer that this mortgage be set

aside, but these averments it will not be necessary to notice, as the decision of the case must be based entirely upon the issues between the plaintiffs and Hooper. The answer alleges possession and the exercise of acts of ownership by Hooper since 1872; denies that Mrs. Hall was ever the owner or in possession of the land; denies that the deed under which she claims was ever executed or delivered to her, or that she ever paid any consideration for the property; and, in short, denies most of the allegations of the petition, and closes with a plea of the statute of limitations.

From the pleadings and evidence the facts in regard to the title appear as follows: In 1868 Hooper commenced an action against Milton S. Hall for the recovery of a debt. A writ of attachment was issued and one Peterson was garnished. Peterson, it would be inferred, never answered the order of garnishment, but in 1869, he being indebted to Hall in about the sum of \$1,200, conveyed the land in controversy by deed running to "Mrs. Milton S. Hall," and at the same time, and as part of the same transaction, a mortgage was executed to Peterson by "M. S. Hall" to secure notes amounting to \$1,006, that being the difference between the estimated value of the land and Peterson's debt to Hall. Mrs. Hall was not present, and it is perfectly clear that the transaction was one between Hall and Peterson for Hall's benefit, Mrs. Hall having no interest therein. Hooper proceeded to judgment in his action against Hall, and caused execution to be levied on the land. He then, in September, 1870, began an action in the nature of a creditors' bill, naming as defendants M. S. Hall, Mrs. Milton S. Hall, and Peterson. The petition in that case alleged the

recovery of the judgment and levy of execution, alleged the attachment and garnishment of Peterson, and charged that the conveyance to Mrs. Hall was the result of a conspiracy between Hall and Peterson to cheat and defraud Hooper. It alleged that Mrs. Milton S. Hall was a fictitious person, and that Hall was the person intended by the deed from Peterson. The prayer was that "Mrs. Milton S. Hall" be declared to mean "M. S. Hall;" that the mortgage to Peterson be declared void against plaintiff, and that the land be subjected to the judgment. There was an attempt by the publication of notice to obtain constructive service upon all the defendants; but as the affidavit for publication made no reference whatever to Mrs. Hall, it may be assumed that the proceedings as to her were absolutely void. Hall and Peterson made default and a decree was entered directing a sale of the land in satisfaction of Hooper's judgment. Under this decree all but forty acres were sold to Hooper, at a price more than sufficient to satisfy his judgment. Subsequently, in 1876, Hooper having become the owner of the notes to secure which Hall had given the mortgage, he brought an action against Hall and his then wife, but not against the heirs of the first Mrs. Hall, he having remarried, to foreclose the mortgage. Service in this case was constructive, but the affidavit for publication is conceded to have been fatally defective. A decree of foreclosure was entered and the remaining forty acres sold under that decree to Hooper. It will be observed that the plaintiffs claim relief solely on the ground that the proceedings were void as to them and their ancestor,—the proceedings on the creditors' bill, because no jurisdiction was obtained as

to Mrs. Hall; the foreclosure proceedings, because no jurisdiction was obtained over any person and the plaintiffs were not even made parties. No offer to redeem from the mortgage is made, because the plaintiffs' theory is that the title being in Mrs. Hall, the mortgage executed by Hall alone created no lien upon her land. In addition to the issues already stated the defendant pleads that plaintiffs are estopped by claiming under the deed to Mrs. Hall from denying the validity of the mortgage executed by Hall as a part of the same transaction. The plaintiffs in reply charge two estoppels. They charge that Hooper is estopped to deny the validity of the conveyance to Mrs. Hall because he claims under a deed purporting to convey her interest. They further charge that the defendant is estopped to assert the validity of the mortgage because of his successful impeachment thereof by the proceedings on the creditors' bill. The district court found "that the plaintiffs have now no cause of action," and dismissed the case. From this decree the plaintiffs appeal. It may be inferred from the use of the word "now" in the finding above quoted, as well as from the direction which the argument has largely taken, that the district court was of the opinion that an action to quiet title would not lie while Hooper was in actual possession of the land. It is clear that plaintiffs, while admitting an estate in Hooper for the life of Hall, could not yet maintain ejectment. If this was the view of the district court it was fully warranted by the case of *State v. Sioux City & P. R. Co.*, 7 Neb., 357, followed by several other cases implying that an action to quiet title will not lie against one in actual possession of the land in controversy. A defendant

in such actual possession is entitled to the rights accorded by an action of ejectment where the plaintiff, claiming the legal title, seeks to oust him from possession. (*Gregory v. Lancaster County Bank*, 16 Neb., 411; *Snowden v. Tyler*, 21 Neb., 199; *Betts v. Sims*, 25 Neb., 166.) The rule stated in these cases is unquestionably correct; but in *State v. Sioux City & P. R. Co.*, *supra*, and some other cases, its limitations were lost sight of. The distinction was not observed between an action to establish title and an action to recover possession of the land. Section 57, chapter 73, Compiled Statutes, provides: "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to said real estate." Section 59 provides: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act." In *Foree v. Stubbs*, 41 Neb., 271, decided since this case was tried in the district court, the object of this statute was carefully considered. *State v. Sioux City & P. R. Co.* was overruled in so far as it denied a right to proceed to quiet title against one in possession, and the rule established in conformity with the language of the statute. If Hooper was tenant of the life estate, a possessory action could not now be maintained against him; but the plaintiffs could proceed under section 59 to have their estate in remainder established.

It becomes necessary to consider separately the

title to that portion of the land sold under the decree based on the creditors' bill and that portion sold under the decree of foreclosure. Considering first the former portion, the plaintiffs claim solely under the deed from Peterson and because of want of jurisdiction over Mrs. Hall in the proceedings resulting in the sale. The evidence shows beyond all controversy that Mrs. Hall paid no consideration for the land and had no connection with the transaction. It is as clear as anything can be made by human evidence that the conveyance of the land to her was an artifice to divest any lien or claim which might have been obtained by virtue of the garnishment of Peterson in the action against Hall. The plaintiffs merely represent Mrs. Hall. They have no higher claim than she had. They are here seeking the affirmative aid of a court of equity to establish their title. Whatever may be the rights of parties to assert at law the invalidity of a judgment, or at law or in equity to resist its enforcement for want of jurisdiction to render it, it is the firmly established doctrine that a court of equity will not lend its affirmative aid to persons seeking to avoid the enforcement of a void judgment, unless it be made to appear that they have a valid defense thereto. (*Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552; *Osborn v. Gehr*, 29 Neb., 661; *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135; *Wilson v. Shipman*, 34 Neb., 573; *Janes v. Howell*, 37 Neb., 320; *Pilger v. Torrence*, 42 Neb., 903.) In some of the cases cited the rule was confined to judgments regular on their face; but we can perceive no distinction on principle. The doctrine is based on the broad principle that to obtain relief from a court of equity an equitable right must be shown. Where

a party is without equity in his favor the court will remit him to his legal remedies. If one cannot obtain the aid of a court of equity to prevent the enforcement of a void judgment without showing a defense thereto, it would seem to follow that he cannot, without showing such defense, obtain the assistance of a court of equity to vacate proceedings whereby the judgment has already been enforced; and to apply the rule to the present case the plaintiffs cannot be permitted to set aside the sale made under the void decree without establishing an equity to the land in themselves. (*Hughes v. Housel*, 33 Neb., 703.)

As to the forty-acre tract, the case rests on entirely different principles. Hooper claims title not under the creditors' bill or adversely to the conveyance to Mrs. Hall, but through that conveyance, or, at least, through the foreclosure of the mortgage which was a part of the transaction. Mrs. Hall died before the foreclosure suit was instituted. The plaintiffs were not made parties, and Hall, who was made a party, was not subjected to valid service. The proceedings were therefore wholly without jurisdiction, and the foreclosure and sale were void. The plaintiffs contend that the mortgage was not a lien upon the land beyond Hall's life estate, which fell in subsequent to the execution of the mortgage. This claim is based on the fact that the mortgage was executed by M. S. Hall in his own name, and did not purport even to be the act of Mrs. Hall or that of Hall as her agent. It must be remembered, however, that the conveyance was made to Mrs. Hall in satisfaction of Peterson's debt to Hall, and the mortgage was executed at the same time, and as a part of the same transaction, to

secure the repayment of the excess of the value of the land over Peterson's debt to Hall. The plaintiffs are entitled to Mrs. Hall's rights,—no more. Hooper, on the other hand, by the purchase of the Peterson notes, became vested with Peterson's rights. It is argued that there is no proof that he paid any consideration for the notes. This, however, makes no difference. (*Loney v. Courtney*, 24 Neb., 580.) Assuming that Hall at the time of the transaction was without any authority to contract on behalf of Mrs. Hall, it is nevertheless the established law that a principal who affirms or ratifies a contract made for him by his agent must adopt all the instrumentalities employed by his agent to bring it to a consummation. (*Joslin v. Miller*, 14 Neb., 91.) The mortgage cannot be sustained as a legal mortgage, because not executed by the owner of the fee; but an application of the principle stated requires that it should be given effect as an equitable mortgage. (*Love v. Sierra Nevada Lake Water & Mining Co.*, 32 Cal., 639; *Miller v. Rutland & W. R. Co.*, 36 Vt., 452.) The rule established by these cases is that a mortgage made by an agent in his own name is binding in equity if the agent had authority and the failure to execute it in the name of the principal resulted from accident or mistake. It is true that Hall had no authority in writing from Mrs. Hall to execute the mortgage, as would seem to be required by section 25, chapter 32, Compiled Statutes; but we do not think that in order to give effect to the equitable principle underlying these decisions the transaction must necessarily be evidenced as required by the statute of frauds. In the Vermont case cited there was no memorandum which to our mind would be sufficient to satisfy the statute. All

that existed was a resolution of the board of directors of the corporation on whose behalf the conveyance was executed. We think the case is within the principle of *Morrow v. Jones*, 41 Neb., 867, where a grantee in a deed absolute in form was held bound through the acceptance of the deed by a defeasance executed by an attorney not in that behalf authorized. The mortgage by Hall must therefore be treated as a valid lien upon the land, as between the parties to the transaction. What the rights of a *bona fide* purchaser would be need not be considered. The case as to the forty-acre tract then resolves itself into this: The mortgagors seek to have their title established against a mortgagee in possession under a sale made to him in the course of void foreclosure proceedings. It is pleaded that Hooper is estopped from setting up title under the foreclosure proceedings by reason of his prior proceedings under the creditors' bill adjudging the mortgage as well as the deed to Mrs. Hall void as against him; but the conveyances attacked by the creditors' bill were not absolutely void. They were only void as against creditors. Hooper was a creditor at the time and he did successfully attack the conveyances; but he satisfied his debt through a sale of the remainder of the land. His debt having been satisfied, the basis on which he obtained the decree in the creditors' bill was destroyed. He was no longer a creditor. He was no longer entitled to attack the conveyances as to the rest of the land. Much less was he estopped from affirming them. Let us suppose that the mortgage had been foreclosed by Peterson himself upon this forty acres. The decree on the creditors' bill would certainly not estop him from

such proceedings. Suppose, on foreclosure by him, Hooper bought the land. He could certainly take good title. Suppose, on the other hand, the land sold in pursuance of the creditors' bill had been bought by a stranger. Hooper would certainly be estopped from setting up the mortgage as against the title of such a stranger acquired under proceedings by Hooper impeaching the mortgage. But Hooper had in the first instance his election to avoid the conveyances or to let them stand. He elected to avoid them as a creditor and subjected a portion of the land to the payment of his debt. The debt was entirely satisfied out of that portion. He was no longer a creditor and could not assert any claim against the remaining portion. He then had the same right to deal with the grantees of the remaining portion on the faith of their ownership as a stranger with notice would have. It is a purely fortuitous circumstance that the same person acquired title to that portion subjected to sale by the creditors' bill and to that portion sold under the mortgage; and no estoppel arises.

The petition having been drawn on the theory that not only were the foreclosure proceedings void, but the mortgage also, no offer was made to redeem from the mortgage. We hold that the mortgage was not void, and therefore the plaintiffs, representing the mortgagor, must, in order to remove the cloud cast by the deed executing the foreclosure sale, offer to pay what is equitably due under the mortgage. (*Loney v. Courtney, supra.*) The fact that the action was not brought until more than ten years after the mortgage matured does not relieve the plaintiffs from that obligation. (*Merriam v. Goodlett, 36 Neb., 384.*) Al-

though the statute of limitations has prevented a foreclosure of the mortgage, the mortgagor must offer to redeem in order to obtain affirmative relief from a court of equity. In the case last cited the plaintiff was permitted to amend in this court by offering to redeem; but in the case before us it stands admitted that Hooper entered into possession in 1876, much more than ten years before this suit was brought. It has been held that where the lands have remained unoccupied, the statute of limitations does not begin to run against a bill to redeem until tender of money or a refusal to reconvey. (*Wilson v. Richards*, 1 Neb., 342.) But we think, by all the authorities, the statute does begin to run after the debt matures from the time the mortgagee enters into open, notorious, and actual possession under claim of ownership. Even under the old practice, where courts of equity were not bound by, but merely followed the analogy of the statutes of limitations, such was the rule. (*Anonymous*, by Lord Hardwicke, 3 Atk. [Eng.], 313; *Dexter v. Arnold*, 1 Sum. [U. S.], 109; *Knowlton v. Walker*, 13 Wis., 295; *Montgomery v. Chadwick*, 7 Ia., 114.) The action was therefore barred whether the four or the ten-year statute applies, and the defendant pleaded the bar.

It is contended that Hooper is rightfully in possession for the life estate of Milton S. Hall, and that, therefore, the statute has not yet begun to run; but we have already held that under our law this action may be maintained by a remainder-man during the term of a tenant for life. Indeed, as already suggested, if this were not true, the plaintiffs would have no standing in court at this time. The answer made to this is

that Hooper's possession has never become adverse to the plaintiffs on account of such life estate; but as to this forty-acre tract, at least, there is not only no presumption that Hooper's possession is for the life estate of Hall, but it was manifestly from the outset adverse to the plaintiffs under a claim of ownership in fee. The foreclosure proceedings are as much void against Hall as they are against the plaintiffs. The mortgage purports to incumber the fee. Foreclosure was sought against the fee. The sheriff's deed purports to convey the fee. It was recorded the day after its execution. Everything shows that Hooper's possession has been under a claim derived from the foreclosure, and not as life tenant. Amendments are by the Code permitted in furtherance of justice. (Code of Civil Procedure, sec. 144.) We hold the mortgage to have been a valid equitable incumbrance upon the land, and that the plaintiffs are not entitled to relief against it as against the mortgagee, in possession under a void foreclosure sale, without offering to redeem. They have not so offered, and their right to redeem being barred by the statute of limitations, we cannot now permit an amendment for that purpose.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

STATE OF NEBRASKA, EX REL. EDWARD PETRY, V.
GEORGE W. LEIDIGH.

FILED FEBRUARY 18, 1896. No. 8242.

1. **Habeas Corpus: REVIEW.** Errors and irregularities of the trial court in a criminal prosecution must be corrected by direct proceeding for a review of the final judgment or order complained of. The writ of *habeas corpus* is never allowed as a substitute for an appeal or writ of error.
2. **Extradition: RIGHT TO TRY FUGITIVE FOR EXTRADITABLE OFFENSES.** A fugitive from justice surrendered by one state upon the demand of another may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders without first having had an opportunity to return to the state by which he was surrendered. (*Lascelles v. Georgia*, 148 U. S., 537.)
3. ———: **CONSTITUTIONAL LAW.** A fugitive is not in such case denied any rights, privileges, or immunities secured to him by the constitution or the laws of the United States.
4. **Imprisonment Without Extradition.** *In re Robinson*, 29 Neb., 135, distinguished.

ORIGINAL application for writ of *habeas corpus*.

The opinion contains a statement of the case.

J. O. Detweiler, for petitioner:

The petitioner not having had an opportunity to return to the state from which he was taken, should only have been tried for the offense for which he was extradited. (9 Am. & Eng. Ency. Law, 252; *State v. Hill*, 40 Kan., 338; *In re Robinson*, 29 Neb., 135; *In re Cannon*, 47 Mich., 481; *Ex parte McKnight*, 28 N. E. Rep. [O.], 1034; *Compton v. Wilder*, 40 O. St., 130; *Van Horn v. Great Western Mfg. Co.*, 37 Kan., 523; *United States v. Watts*, 14

Fed. Rep., 130; *Ex parte Hibbs*, 26 Fed. Rep., 421; *Ex parte Coy*, 32 Fed. Rep., 911; *United States v. Rauscher*, 119 U. S., 407; *State v. Vanderpool*, 39 O. St., 278; *Commonwealth v. Hawes*, 13 Bush [Ky.], 700; *State v. Simmons*, 39 Kan., 262; *State v. Ross*, 21 Ia., 467; *State v. Brewster*, 7 Vt., 118; *Dows' Case*, 18 Pa. St., 37; *Ker v. People*, 110 Ill., 627.)

Habeas corpus is the proper writ upon which to procure the prisoner's discharge. (*Ex parte McKnight*, 28 N. E. Rep. [O.], 1034; *In re Robinson*, 29 Neb., 135.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state:

The court has jurisdiction over the person of one who has been extradited from a sister state to place him on trial for an offense other than that for which he was extradited, without his first having had an opportunity to return to the state of his asylum. (*State v. Brewster*, 7 Vt., 118; *In re Noyes*, 17 Albany L. J., 407; *Kingen v. Kelley*, 28 Pac. Rep. [Wyo.], 36; *State v. Glover*, 17 S. E. Rep. [N. Car.], 525; *In re Keller*, 36 Fed. Rep., 682; *Mahon v. Justice*, 127 U. S., 700; *State v. Ross*, 21 Ia., 467; *State v. Stewart*, 19 N. W. Rep. [Wis.], 429; *Ham v. State*, 4 Tex. App., 645; *Williams v. Weber*, 28 Pac. Rep. [Colo.], 21; *People v. Cross*, 32 N. E. Rep. [N. Y.], 246; *Commonwealth v. Wright*, 33 N. E. Rep. [Mass.], 82; *Lascelles v. State*, 16 S. E. Rep. [Ga.], 945; *State v. Kealy*, 56 N. W. Rep. [Ia.], 283; *State v. Wenzel*, 77 Ind., 428; *Cook v. Hart*, 146 U. S., 183; *In re Miles*, 52 Vt., 609.)

Upon the facts presented by the record *habeas corpus* is not petitioner's proper remedy. (*Ex parte Fisher*, 6 Neb., 309; *Williamson's Case*, 26 Pa. St., 17; *Commonwealth v. Deacon*, 8 S. & R. [Pa.], 72;

Ex parte Toney, 11 Mo., 661; *In re Betts*, 36 Neb., 282; *State v. Crinklaw*, 40 Neb., 759; *In re Havlik*, 45 Neb., 747.)

Post, C. J.

This is an application addressed to this court, in the exercise of its original jurisdiction, for a writ of *habeas corpus* in behalf of Edward Petry, who is, according to the complaint which is the basis of the proceeding, unlawfully imprisoned by the respondent, George W. Leidigh, as warden of the penitentiary. It is unnecessary to copy at length from the record, as the material facts may be briefly stated, viz.: On the 4th day of April, 1895, application was made to the governor of this state for a requisition upon the governor of Illinois for the surrender of the relator, an alleged fugitive from justice, who was charged by the complaint of one Jewett with burglariously entering the house of the said complainant, in the county of Douglas, in the night season, and with stealing therefrom jewelry and clothing of the value of \$50. Upon said application a requisition was allowed, in pursuance of which a warrant was issued by the governor of Illinois for the apprehension of the relator, and upon which the latter was, on March 7, arrested and immediately thereafter conveyed to Douglas county, in this state, for trial. Having waived a preliminary hearing upon the charge mentioned, he was committed to the jail of said county, and on the 3d day of May an information was filed by the county attorney charging him with the identical offense specified in the extradition papers, to which he interposed a plea of not guilty and was remanded for trial. On the 20th day of June, 1895, the said relator,

without having had an opportunity to depart from this state, and without his consent, was taken before a magistrate in and for Douglas county and required to answer another and different charge, to-wit, of burglariously entering the house of one Thomas H. O'Neill and stealing therefrom jewelry of the value of \$37.50, and upon which charge he was committed for trial. Afterward, during the May, 1895, term of the district court, an information was therein filed by the county attorney charging the relator with the last mentioned offense, and to which the latter, at a subsequent day of the term, entered a plea of not guilty, accompanied by an affidavit challenging the jurisdiction of the court over his person, in which the matters here stated are set out in detail. His objection to the jurisdiction of the court being overruled, a trial was had, resulting in a conviction of the offense charged in said information, and which judgment the respondent relies upon as a justification in this proceeding.

It is in the first place contended by the attorney general that, conceding the action complained of to be irregular, it is at most voidable, not affecting the jurisdiction of the district court, and that the relator's remedy is accordingly by direct proceeding to secure a review of the judgment of conviction. There appears to be no doubt of the soundness of that proposition, either upon reason or authority. The accused, in the language of the statute, "shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment, or pleading in bar, or the general issue." (Criminal Code, sec. 444.) The writ of *habeas corpus*, as said by this court in *State v.*

Crinklaw, 40 Neb., 759, "is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error," and the same principle is distinctly recognized in *Ex parte Fisher*, 6 Neb., 309; *In re Betts*, 36 Neb., 282; *In re Havlik*, 45 Neb., 747.

But there exists a fundamental objection to this proceeding. The right of a demanding state, upon the surrender of a fugitive from justice, to try him upon a charge other than that specified in the extradition papers has long been the subject of judicial controversy. Arrayed on one side are cases which appear to rest upon the inherent justice of the claim that a court cannot acquire jurisdiction over the person of one accused of crime through the fraud, duplicity, or abuse of process by an officer or agent entrusted with the impartial administration of the law. On the other hand are cases holding that a fugitive surrendered by one state on the demand of another may, under the constitution and the laws of the United States, be prosecuted for any extraditable offense committed within the territorial jurisdiction of the latter, on the ground that there exists no right of asylum as applied to interstate extradition, and that it would be a useless and idle ceremony to return a fugitive to another state in order to again demand his surrender for trial. The constitutional provision upon the subject is found in section 2 of article 4 of the constitution of the United States, viz.: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The acts of congress bearing upon

the subject (secs. 5278, 5279, Revised Statutes, U. S.) are designed merely to carry into effect the constitutional provision, without assuming to enlarge or restrict the rights of the several states thereunder. During every stage of the discussion the courts have agreed substantially upon one proposition, viz., that the subject involved is a construction of the national constitution, and, therefore, in its broadest sense, a federal question. It is worthy of note, too, that until a comparatively recent date the diversity of opinion among federal judges respecting the true interpretation of the foregoing provision was no less radical than existed between state courts. But in *Lascelles v. Georgia*, 148 U. S., 537, which was a writ of error to the supreme court of the state of Georgia, the subject was by the supreme court considered in all of its phases, and the conclusion announced fully sustained the power of the demanding state to try a fugitive surrendered pursuant to the constitution of the United States, for any crime committed within its borders, whether specified in the extradition warrant or not, and that one so tried is not thereby deprived of any rights, privileges, or immunities secured to him by the constitution or laws of congress. As that case must be regarded as an authoritative construction of the constitutional provision governing the subject, and binding alike upon state and federal tribunals, we feel warranted in here quoting at some length from the opinion of the court by Mr. Justice Jackson: "But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the constitution, treaties, or laws of the United States which exempts an of-

fender, brought before the courts of a state, for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process. (*Ker v. State of Illinois*, 119 U. S., 436; *Mahon v. Justice*, 127 U. S., 700; *Cook v. Hart*, 146 U. S., 183.) * * * To apply the rule of international or foreign extradition as announced in *United States v. Rauscher*, 119 U. S., 407, to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty, contract, or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned."

In re Robinson, 29 Neb., 135, has been cited as supporting the claim of the relator; but that contention is based upon apparent misconception of what is there decided, viz., that one forcibly and unlawfully carried into this state will not be held to answer to a criminal charge without an opportunity to return to the state from whence he is brought. What is there said in regard to the right of the state to prosecute a fugitive regularly

City of Harvard v. Crouch.

extradited is mere *obiter*, and not intended as decisive of the question now before us. To what extent that case is to be regarded as authority, when applied to the same or a similar state of facts, in view of the decision in *Lascelles v. Georgia*, is a question foreign to this controversy and does not call for notice. It follows, however, that the writ must be denied and the relator remanded to the custody of the respondent.

WRIT DENIED.

CITY OF HARVARD V. L. P. CROUCH, ADMINISTRATOR.

47	133
52	42
55	565

FILED FEBRUARY 18, 1896. No. 6081.

1. **Review: WEIGHT OF EVIDENCE.** A judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of the evidence.
2. **Municipal Corporations: CHANGE IN GRADE OF STREETS: DAMAGES.** Under the constitution of this state providing that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface. (*Harmon v. City of Omaha*, 17 Neb., 548.)
3. ———: ———: ———. The measure of damage in such cases is the depreciation in the value of the property, occasioned by the change of grade. (*Omaha Belt R. Co. v. McDermott*, 25 Neb., 714.)
4. **Witnesses: CREDIBILITY: INSTRUCTIONS: REVIEW.** It is not error to advise the jury that in determining the credit which should be given to the defendant's witnesses their interest in the result of the suit may be taken into consideration. (*Barmby v. Wolfe*, 44 Neb., 77.)

ERROR from the district court of Clay county.
Tried below before MORRIS, J.

Leslie G. Hurd, for plaintiff in error.

L. P. Crouch, contra.

POST, C. J.

A former opinion in this cause is reported under the title of *Hammond v. City of Harvard*, 31 Neb., 635. The plaintiff below, Hammond, having died in the meantime, the cause was prosecuted to judgment in the name of L. P. Crouch as administrator. The facts essential to an understanding of the controversy are set out at length in the opinion referred to, and need not be here repeated. It is sufficient for our present purpose that the cause of action alleged is (1) the grading of Clay avenue, in the city of Harvard, so as to collect and discharge the surface water upon the lot of the deceased adjacent thereto, and against a certain brick building situated upon said lot; (2) the raising of the sidewalk in front of the plaintiff's said building from fourteen to sixteen inches above the level of the floor, and exposing it to invasion of the floods at certain seasons of the year.

We have carefully read the evidence in the record and are unable to say that the amount of the verdict, \$310, is excessive. Were the question an open one for a finding in accordance with what, to us, appears the weight of the evidence, we would feel constrained to assess the plaintiff's damage at a sum considerably less than that awarded by the jury; but, as has frequently been said, a judgment will not be reversed on account of a mere difference of opinion between this court and the

trial judge or jury regarding the weight of the evidence.

Exception was taken during the trial in various forms on the ground that the facts alleged and proved do not constitute a cause of action against the city. Such objections appear to rest upon the proposition that the deceased, Hammond, in the construction of the building in question, evidently anticipated the action of the city in the improvement of the street upon which it abuts, and must be held to have contemplated the inconvenience which is naturally incident to such improvement, or, as said in *Callender v. Marsh*, 1 Pick. [Mass.], 418: "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of the city may require. * * * and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit." Such is undoubtedly the rule of the common law (2 Dillon, *Municipal Corporations*, secs. 990, 995a); but under our constitution, which prohibits the taking or damaging of private property for public use without compensation, that rule can have no application. (*Harmon v. City of Omaha*, 17 Neb., 548; *Hammond v. City of Harvard*, 31 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 298.) And the views expressed in the cases cited are in harmony with the decisions of other courts under like constitutional provisions. (*City Council of Montgomery v. Townsend*, 80 Ala., 491; *Hot Springs R. Co. v. Williamson*, 45 Ark., 436; *City of Atlanta v. Green*, 67 Ga., 386; *City of Fort Worth v. Howard*, 22 S. W. Rep. [Tex.], 1059; *Davis v. Missouri P. R. Co.*, 24 S. W. Rep. [Mo.], 777.)

Among other instructions asked by the defendant below, and refused, is one to the effect that the purchaser of property abutting upon a street is presumed to have consented to such changes in the surface of the street as are obviously necessary in order to subserve public rights and interests. But we will not at this time determine the question of the soundness of the instruction asked, or whether it may be harmonized with the rule above stated, since we agree with the district court that it was altogether unwarranted by the evidence.

Exception was also taken to the refusal of the court to charge that "it is the plaintiff's duty to protect his property from injury or damage by any reasonable means in his power, and any loss or damage suffered by him which he might by reasonable means have prevented is not chargeable to the city." This instruction was rightly refused. The measure of damage is the depreciation in the value of the property occasioned by the grading of the street. (*Omaha Belt R. Co. v. McDermott*, 25 Neb., 714.) Evidence was received by the trial court tending to prove that it was possible, at a trifling cost, to protect the property in question against the water discharged upon it as the result of the improvement of the street. Such evidence was admissible as bearing directly upon the present value of the property, but the ultimate inquiry is as already suggested, how much, if at all, has the property depreciated in value in consequence of the improvement complained of?

Exception was taken to the giving of the following instruction: "In passing upon the testimony of the witnesses for the defendant, you have a

right to take into consideration any interest which such witnesses may feel in the result of the suit, if any is proved or appears, growing out of their relationship or interest in the defendant or otherwise, and give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial." The witnesses for the defendant city were mostly, if not all, residents and taxpayers therein, and had to that extent a pecuniary interest in the result of the trial, from which it is argued that the effect of the instructions quoted was to discredit their testimony. Practically the same question was presented for consideration in *Barmby v. Wolfe*, 44 Neb., 77, and decided adversely to the contention of the plaintiff in error. It is there said, referring to *Housh v. State*, 43 Neb., 163, and *Carleton v. State*, 43 Neb., 373: "In the two latest cases doubts were expressed as to the policy of such instructions, but the question was no longer deemed an open one." The rule thus stated follows logically from the doctrine of the earlier opinions of this court and is decisive of the question here presented.

The remaining assignments of error present in different forms the questions already examined, and do not require further notice at this time. We discover no error in the record and the judgment will be

AFFIRMED.

47	138
149	820
51	626
54	93

HOME FIRE INSURANCE COMPANY OF OMAHA V. CATHARINE KENNEDY.

FILED FEBRUARY 18, 1896. No. 6184.

1. **Insurance: FAILURE TO DECLARE FORFEITURE: WAIVER OF BREACH OF WARRANTY.** An insurance company which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, fails to declare such policy forfeited, but, on the contrary, continues to recognize its liability thereon, by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damage only, will be *held* to have waived all defenses based upon such breach of warranty and resulting forfeiture of the policy.
2. ———: ———: ———. So *held*, notwithstanding the secretary of the defendant company, in returning the proof of loss for correction, added: "This company neither admits nor denies its liability nor waives any of its rights under said policy."
3. ———: **ARBITRATION.** A stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy.
4. ———: ———: **WAIVER.** An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Jacob Fawcett, for plaintiff in error.

I. J. Dunn and Martin Langdon, contra.

POST, C. J.

This was an action by the defendant in error, Catharine Kennedy, against the plaintiff in error, the Home Fire Insurance Company of Omaha, upon a policy of insurance. The defendant company for answer admitted the insuring of the plaintiff's property, to-wit, a two-story frame and brick building, and that said building was destroyed by fire within the period covered by said policy. It, however, alleged that said policy was not in force at the time of the loss, for reasons which will be hereafter noticed. A trial was had in the district court for Douglas county, resulting in a verdict and judgment for the plaintiff below, which has been removed into this court for review by the defendant company.

It is first contended that the risk was increased in violation of the policy, (1) from the fact that the building described therein was at the time of the loss used and occupied as a tenement house, whereas it was insured as a private dwelling only; (2) by the use and keeping therein of gasoline in excess of the amount permitted by the policy. In support of the first of the alleged violations we are referred to the following questions and answers shown by the application for the policy: "Q. Is the house occupied for private dwelling only? A. Yes. Q. By owner? A. Yes." And also to the following conditions of the policy: "Or if the risk be increased in any manner without consent indorsed hereon, * * * then this policy shall be null and void." It is not claimed that the representations of the insured respecting the occupancy of the premises at the date of the policy were false as to any essential fact. The only evi-

dence we discover bearing upon that question is the following testimony of the defendant in error, Mrs. Kennedy:

Q. Who was occupying the house at the time the policy was issued, March 30, 1889?

A. I could not say whether there was any one but myself or not.

Q. The house was not complete at the time the policy was issued?

A. No, sir.

It is, however, contended that the foregoing condition of the policy, in connection with the application, is to be construed as a continuing warranty or affirmative agreement that the validity of the said policy should depend upon the literal fulfillment of the contract by the insured. Applying the rule thus asserted to the facts disclosed by this record, counsel argue that the policy is void and of no effect, for the reason that there were at the time of the loss, in addition to the family of the insured, consisting of herself and son, three families occupying rooms in said house, although the record is silent respecting the number of such occupants or the character of their tenure. It is deemed unnecessary to review the many authorities cited in support of that contention, since it is, we think, conclusively shown that the defendant company has, by its action subsequent to the loss, waived whatever right it may have had to declare the policy void on account of the facts stated, or by reason of the violation of the condition regarding the keeping of gasoline in the building insured. The company, according to the testimony of its own witnesses, was fully advised of the facts constituting the alleged violation of the contract by the insured, five days

after the loss, to-wit, on March 16, 1891. Fourteen days later, on March 30, the plaintiff below served upon the defendant what appears to be formal proof of loss, sworn to before a notary public and attested by two disinterested neighbors, in the presence of a justice of the peace. On the same day Mr. Barber, secretary of the defendant company, acknowledged the receipt thereof as follows:

“OMAHA, NEB., March 30, 1891.

“Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Nebraska.

“Papers purporting to be proofs of an alleged loss under said policy have been received, but same are irregular, defective, and deficient, in that they do not comply with the terms of the said policy, in that it requires that proofs duly executed and sworn to by the *assured* under the said policy be made and furnished the said company. *You* have been required, and are hereby required, to *render under oath* a particular account of said alleged loss, setting forth the date and circumstances of the same, together with title, occupancy, and other insurance, if any, and itemized estimate of the value of the property destroyed, said proofs to be *signed and executed* in accordance with the terms of said policy. No estimate of the said building insured under the said policy, nor the alleged damage thereto, made by J. P. Gardiner, nor any other person, have been furnished this company by you. The papers purporting to be proofs of loss are not signed and sworn to by *you*, and are defective and deficient as to every requirement of said policy, the same are herewith returned declined.

"The said company neither admits nor denies liability, nor waives any of its rights under said policy.

"Very truly, CHAS. J. BARBER,
"Secretary Home Fire Insurance Company."

In accordance with the direction contained in the above communication the plaintiff, on April 1, served upon the company an additional, or, as described by the witnesses, an amended proof of loss, which was likewise returned, accompanied by the following letter:

"OMAHA, NEB., April 3, 1891.

"Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Neb.

"MADAM: Papers purporting to be proof of your alleged loss and damage under the said policy have been received, but same are defective, deficient, and incomplete, in that they do not fully set forth the occupancy of the said building alleged to have been damaged, nor are they accompanied by an itemized estimate of value of property destroyed, nor are said alleged proofs signed by two disinterested neighbors, nor by nearest magistrate, as required by terms of the said policy. The estimates given in said proofs are in lump, and not itemized, and are not made by competent party. The estimate must be specific and in detail in order to be an itemized estimate. The papers are therefore herewith returned, declined.

"Very truly, CHAS. J. BARBER,
"Secretary Fire Insurance Company."

And on April 6 the plaintiff prepared and served a third statement of her loss, which, so far as appears, conforms to all the suggestions of the

defendant company. She was in the meantime notified by the defendant of its election to arbitrate the differences between them, by letter of Mr. Barber, under date of March 31, in the following language:

“OMAHA, March 31, 1891.

“Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha.

“MADAM: Arbitration of the differences that have arisen between you and the said company, as to the actual damages by fire to building insured under the said policy, is hereby demanded. Please name arbitrator and date agreeable to have said arbitration take place. The said company, by calling for arbitration, neither admits nor denies liability, nor waives any of its rights under the said policy.

“Very truly, CHAS. J. BARBER,
“*Sec. Home Fire Insurance Company.*”

The foregoing was followed by communications bearing date of April 3d, 4th, 8th, and 24th, each, in positive terms, demanding arbitration in accordance with a provision of the policy for the adjustment by that means of controversies relating to the amount of loss or damage by the insured.

In *Hollis v. State Ins. Co.*, 65 Ia., 454, the rule is thus stated: “Where the insured, at the time of the loss, has forfeited his right to recover on the policy, and the company, knowing the facts, continues to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waives the forfeiture;” and in *Titus v. Glens Falls Ins. Co.*, 81 N. Y., 410, we observe the following

language: "But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it (the insurer) recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." (See, also, *Webster v. Phoenix Ins. Co.*, 36 Wis., 67; *Cannon v. Home Ins. Co. of New York*, 53 Wis., 585; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S., 234; *Silverberg v. Phenix Ins. Co.*, 67 Cal., 36; *Marthinson v. North British & Mercantile Ins. Co.*, 64 Mich., 372; *Eddy v. Merchants, Manufacturers & Citizens Mutual Fire Ins. Co.*, 72 Mich., 651; *German Ins. Co. v. Gibson*, 53 Ark., 494.)

The foregoing, among the many cases in harmony therewith, serve to illustrate the rule applicable to the present controversy. The demand for successive proofs of loss after knowledge of all the facts, upon grounds which are, to say the least, highly technical, thus imposing upon the insured the labor and expense incident to their preparation, and the repeated peremptory calls for arbitration, in accordance with the terms of the policy relating to the measure of damage only, cannot be construed otherwise than as a waiver of the alleged forfeiture. And the rulings complained of, so far as they relate to that branch of the case, if erroneous, are manifestly not prejudicial to the plaintiff in error; nor are we unmindful of the fact that Mr. Barber, on the return of the first proof of loss, disavowed the admission

thereby of any liability on the part of the defendant company or a waiver of any of its rights. But such a disavowal will not vary the legal effect of his actions in behalf of the defendant. In *Martinson v. North British & Mercantile Ins. Co.*, *supra*, a case in point, the managing officer of the company, on returning the proof of loss for correction, used this language: "You will further take notice that, in returning said papers and making the objection thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself." In commenting upon the foregoing the court, by Morse, J., say: "We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proof of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proofs of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct."

The only remaining question relates to the effect of the provision of the policy for determining, in case of loss, by arbitration of the amount of damage. It has been repeatedly held that a

stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject-matter of the controversy. (*Hostetter v. City of Pittsburgh*, 107 Pa. St., 419; *Commercial Union Assurance Co. of London v. Hocking*, 115 Pa. St., 407; *Donnell v. Lee*, 58 Mo. App., 288; *Rison v. Moon*, 22 S. E. Rep. [Va.], 165; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis., 419; *German-American Ins. Co. v. Etherton*, 25 Neb., 505.) The last mentioned case furnishes an additional reason for the rejection of the defense based upon the refusal of the plaintiff below to arbitrate, viz., that the denial by the defendant company of its liability under the policy is a waiver of whatever right it may have had to insist upon the means therein provided for ascertaining the amount of the plaintiff's damage.

The judgment of the district court is right and must be

AFFIRMED.

DAVID T. SHARPLESS V. R. E. GIFFEN.

FILED FEBRUARY 18, 1896. No. 6025.

1. **Negotiable Instruments: WANT OF CONSIDERATION: PLEADING.** Want of consideration in an action on a promissory note is new matter which must be specially pleaded, and is not available as a defense under a general denial.

47	146
52	685

47	146
57	13

2. **Dismissal.** The plaintiff may, as a matter of right, under section 430 of the Civil Code, dismiss his action without prejudice at any time before its final submission to the court or jury.

ERROR from the district court of Lancaster county. Tried below before TUTTLE, J.

Harwood, Ames & Pettis, for plaintiff in error.

Atkinson & Doty, contra.

POST, C. J.

This cause originated before a justice of the peace for Lancaster county, from whence it was taken by appeal to the district court for said county, and where a trial was had to the court, a jury being waived, resulting in the judgment for the defendant therein, which it is sought to reverse by means of this proceeding.

The cause of action alleged in the petition below is a note for \$144.80, bearing date of May 14, 1881, payable on demand to S. E. Sharpless, and in due form assigned to the plaintiff. The answer is a general denial. The defendant was by the district court permitted, over the objection of the plaintiff, to introduce evidence tending to prove a want of consideration for the note sued on, and which ruling is now relied upon for a reversal of the judgment.

In admitting the evidence complained of the district court erred. The general denial put in issue the execution of the note only. Want of consideration is new matter, within the meaning of the Code, which, to be available as a defense, must be specially pleaded. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Jones v. Seward County*,

Sharpless v. Giffen.

10 Neb., 154; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756.) It is clear, from an inspection of the record, that the finding of the district court rests upon the alleged want of consideration. The case is not, therefore, within the exception recognized by this court, viz., that a judgment in a case tried without a jury will not be disturbed on account of the admission of immaterial evidence, when there is in the record sufficient competent evidence to sustain the finding complained of.

On the production of the evidence, and before the final submission of the cause, the plaintiff asked leave to dismiss his action without prejudice, which was refused and which is also assigned as error. Section 430 of the Code confers upon the plaintiff the right to dismiss his action without prejudice at any time before its final submission to the court or jury, and in refusing the request in this instance the court erred. *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, and *Chicago, B. & Q. R. Co. v. Richardson*, 28 Neb., 118, cited in support of ruling of the district court, are not in point. It was in the cases cited held that there was sufficient evidence to submit to the jury, and that they could not, therefore, be dismissed over the objection of the plaintiff. The judgment is reversed and the cause remanded for trial *de novo*.

REVERSED.

FIRST NATIONAL BANK OF CHADRON V. MCKINNEY, HUNDLEY & WALKER.

47	149
49	868
52	737
54	793
47	149
159	46

FILED FEBRUARY 18, 1896. No. 6989.

1. **Sales: FRAUD OF PURCHASER: PLEADING AND PROOF.** Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.
2. ———: **REPLEVIN: RATIFICATION: ELECTION OF REMEDIES.** A vendor who is induced to part with possession of property through the fraud of the purchasers has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action on the contract.
3. ———: ———: ———: ———. But such remedies are not concurrent, and by electing to pursue one, with a knowledge of the facts, he waives his right to the other.

ERROR from the district court of Dawes county.
Tried below before KINKAID, J.

Albert W. Crites, for plaintiff in error.

Bartlett, Baldrige & De Bord and *Spargur & Fisher*, contra.

POST, C. J.

This cause was before us at the January, 1893, term, at which time it was held that the petition below stated a cause of action against the defendant therein, the plaintiff in error, for the recovery of merchandise sold to one Charles F. Yates, the plaintiff below having elected to rescind the contract of sale on account of the fraud of said Yates, through whom the defendant claims by virtue of

a chattel mortgage. (*McKinney v. First National Bank of Chadron*, 36 Neb., 629.) Since then a second trial has been had in the district court for Dawes county, resulting in a verdict for the plaintiff therein in accordance with the peremptory instructions of the court. A motion for a new trial having been overruled, judgment was entered upon the verdict, which has been removed into this court for review by means of the petition in error of the unsuccessful party.

The first proposition to which we will give attention is that there is a fatal variance between the allegations of the plaintiffs below and the proofs; but that argument is without force. The charge of the petition is that Yates, being insolvent at the time of the purchase of the goods, concealed his insolvency from the plaintiff, whereas the evidence received over the objection of the defendants tended strongly to prove false representations by him, Yates, respecting his financial standing, whereby he was shown to be possessed of a large amount of property over and above his liabilities. The false statements proved certainly tend to sustain the allegations that Yates concealed his insolvency at the time of the purchase of the goods in controversy, and were, therefore, rightly received in evidence.

It is contended that the peremptory instruction was unwarranted by the evidence, there being no proof of Yates' insolvency when he purchased the goods which are the subject of this controversy; but in that view we are unable to concur. On the contrary, we have no doubt, from a careful examination of the record, that Yates was at the time in question, within his own knowledge, hopelessly insolvent.

According to the record offered in evidence, and which is made a part of the bill of exceptions, the defendants in error, before the commencement of this action, brought suit against Yates for the contract price of the identical bill of goods now in controversy, which is still pending in the district court for Dawes county, and in which there was issued an order of attachment, upon the filing of an affidavit in due form by F. M. Dorrington, as attorney for plaintiffs therein, pursuant to which the plaintiff in error was served with garnishee process as the supposed debtor of said Yates. On the offer of said record Mr. Baldrige, attorney for defendants in error, testified that in the year 1889 he was a member of the firm of Baldrige, Blair & Green, engaged in the practice of law in the city of Omaha; that some time during said year defendants in error telegraphed his said firm to protect their interests with respect to their claim against Yates, and that "We were then, and ever since have been, one of the attorneys for the plaintiffs in this suit. I never authorized any attachment papers to be filed that I have any recollection of. I consulted with my partners at the time the claim was telegraphed to us. That is as much as I can say of my own knowledge." And on cross-examination he was asked if Mr. Dorrington, who appeared for the defendants in error as plaintiffs in said action, was not associated with him or his firm. To which he answered, "I don't know. I understood Spargur & Fisher were." And to the inquiry, "Was not Dorrington the first attorney your firm employed?" he answered, "I don't know. The only correspondence I remember was with Spargur & Fisher. I don't recollect of any correspond-

ence with Mr. Dorrington." Counsel thus sought to prove that the action against Yates for the price of goods was unauthorized by defendants in error; but for that purpose the evidence quoted is, for obvious reasons, wholly insufficient.

A vendor who is induced to part with possession of property through the fraud of a purchaser has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action *ex contractu*; but such remedies are not concurrent, and by electing to pursue one with knowledge of the facts, he waives his right to the other. (*Morris v. Rexford*, 18 N. Y., 552; *Rodermund v. Clark*, 46 N. Y., 354; *Bach v. Tuch*, 26 N. E. Rep. [N. Y.], 1019; *Bryan & Brown Shoe Co. v. Block*, 12 S. W. Rep. [Ark.], 1073; 2 Herman, Estoppel & Res Judicata, sec. 1051.) True, the suit against Yates may have been unauthorized or brought without knowledge of the fraud alleged as ground for the rescission of the contract of sale; but such facts will not be presumed, and, if relied upon, must be affirmatively shown by the party asserting them. It follows that the record should have been admitted in evidence and that its rejection was error, for which the judgment must be reversed and the cause remanded for trial *de novo*.

There are other errors assigned which need not be noticed at this time, since they involve questions of practice mainly, and which may not arise in the further prosecution of the cause.

REVERSED.

M. J. WAUGH V. F. A. GRAHAM ET AL.**FILED FEBRUARY 18, 1896. No. 7981.**

- 1. Intoxicating Liquors: DECISION ON APPLICATION FOR LICENSE: APPEAL: EVIDENCE.** In an appeal from the action of a body authorized to hear and decide applications for license to sell intoxicating liquors, in order to properly present any evidence which may have been introduced at the original hearing, to the appellate court, it must be reduced to writing, filed in the office of application, and transmitted to the appellate court.
- 2. ———: PETITION FOR LICENSE: DESCRIPTION OF PREMISES.** A petition filed in an application for license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location, and if it does this it is sufficient.
- 3. ———: ———: REMONSTRANCES: APPEAL.** Persons remonstrating against the issuance of a liquor license should make and present the objections they desire to urge to the body authorized by law to pass upon applications for such licenses. Ordinarily, questions not raised before the original tribunal need not, or will not, be considered in the appellate court.
- 4. ———: EXCISE BOARD.** The authority to pass upon applications for liquor licenses vests in the body upon which it is by law conferred a discretionary power. Its action is judicial and not merely ministerial.
- 5. ———: APPEAL FROM DECISION OF EXCISE BOARD: REVIEW.** Where questions of fact have been determined by the body authorized to pass upon applications for licenses to sell intoxicating liquors, and also by the district court, to which an appeal has been taken from the decision of the licensing body, and the findings or conclusions agree, they will not be disturbed in error proceedings to this court, unless manifestly wrong.

ERROR from the district court of Lancaster county. Tried below before HOLMES, J.

The issues appear in the opinion.

A. G. Greenlee, for plaintiff in error:

The application praying for a license at 229 M street did not give the excise board or the court jurisdiction to grant a license to open a saloon at 229 South Thirteenth street. (*State v. Weber*, 20 Neb., 467; *Dexter v. Town Council*, 21 Atl. Rep. [R. I.], 347; *Commonwealth v. Bearce*, 23 N. E. Rep. [Mass.], 99.)

The excise board and the court erred in granting a license upon the petition, for the reason that it does not comply with the rule of the excise board requiring that it shall contain the certificate of the register of deeds that the signers of the petition are residents and freeholders of the ward in which sales under such license are to take place, there being no other proof that the signers were such as are authorized by the statutes to request such license. (*State v. Hill*, 19 Atl. Rep. [N. J.], 789.)

The court erred in its finding that the matter of granting saloon licenses is wholly in the discretion of the excise board, and unless it appears affirmatively from the evidence that the granting of the license was an abuse of such discretion, the order of the board should not be disturbed, and in thus refusing the exercise of the court's own judgment upon the application. (*Livingston v. Corey*, 33 Neb., 372; *State v. Bonsfield*, 24 Neb., 517; *Pleuler v. State*, 11 Neb., 547; *State v. Hanlon*, 24 Neb., 608.)

Reference is also made to the following cases: *State v. Barton*, 27 Neb., 481; *State v. Village of Elwood*, 37 Neb., 473; *Foley v. State*, 42 Neb., 233.

L. W. Billingsley and R. J. Greene, contra.

References: *Brown v. Lutz*, 36 Neb., 532; *Lambert v. Stevens*, 29 Neb., 283; *Lydick v. Korner*, 13 Neb., 10; *Powell v. Egan*, 42 Neb., 482.

HARRISON, J.

A. L. Hoover of defendants applied to the excise board of the city of Lincoln for license to sell liquors,—as was stated in the petition of the applicant,—“at No. 229 M street, in said city, situated on lot 12, block 66, city.” To this application remonstrances were filed, and after a hearing the excise board granted a license to A. L. Hoover to sell intoxicating liquors at 229 South Thirteenth street, from which action an appeal was taken to the district court of Lancaster county, which court, after a hearing, dismissed the appeal. Plaintiffs in error have presented the case to this court by proceedings in error.

We will first notice the condition of the record presented here, and as before the district court. If considered upon the merits in the district court, it must have been upon the testimony introduced at the hearing before the excise board, and upon this alone. (*State v. Bonsfield*, 24 Neb., 517.) In order to properly bring such evidence before the district court it was necessary that it be reduced to writing and filed in the office of application and transmitted to the district court to which an appeal was taken. (Compiled Statutes, ch. 50, sec. 4.) It was said by MAXWELL, J., in *Lydick v. Korner*, 13 Neb., 10: “The testimony taken before the city council must be reduced to writing, and should be certified by the presiding officer as all the testi-

mony taken, as the statute seems to require the judge of the district court to decide the case upon such evidence alone." And in the opinion in *Powell v. Egan*, written by IRVINE, C., 42 Neb., 483, it was stated, after quoting the section to which reference has been made: "The statute therefore requires the certification of the evidence to the district court." There was a finding on this question by the judge before whom it was tried in the district court, which was as follows: "That the purported evidence taken before said board upon the hearing of plaintiff's remonstrance, and filed herein, was never filed with the city clerk or the excise board, as provided in section 4, chapter 50, of the Statutes of 1881, and that the same is not certified by the said clerk or presiding officer of the said board, as required by law, and was not transmitted by said clerk or any officer of said board to this court, and is not, therefore, properly or sufficiently authenticated as the testimony taken upon said hearing." This, we think, was correct, and the rule announced a true one.

It is contended for plaintiff in error that the application for a license to sell intoxicating liquors at 229 M street did not give the excise board jurisdiction to grant a license to open and conduct a saloon at 229 South Thirteenth street. To thoroughly understand the question here raised it will be necessary to refer to the description of the location of the prospective saloon, contained in the several papers filed as required in the proceedings preliminary to the issuance of the license. In the petition of the applicant it was set forth as "at No. 229 M street, in said city [referring to Lincoln], situated on lot 12, block 66, city." In the published notice of the application

it was stated to be "in building situated at 229 South Thirteenth street, on lot 12, block 66, fronting on Thirteenth street in said city." Counsel for plaintiff in error contends that the excise board could not, upon a petition for license to run a saloon at 229 M street, issue it for one to be conducted at 229 South Thirteenth street; that the places so designated are in different wards of the city; that the petition fixed the location of the proposed saloon in the Second ward of the city, and the license as issued was for a location in the Fourth ward. The section of our statute governing in the particular involved states that the petition for a license shall be sufficient if signed by thirty of the resident freeholders of the ward where the sale of the liquors is to take place. We agree with counsel that this implies that the location of the saloon business for which license is sought shall be stated or described more or less accurately in the application for the license. Of a set of rules adopted by the excise board in regard to the license and regulation of the sale of intoxicating liquors within the city of Lincoln was one which required quite a definite and specific description of the location of any proposed saloon to be given in the application for the license therefor. A petition filed in an application for a license to sell intoxicating liquors should comply with the requirements of the law, and include all things which the law prescribes shall appear therein, but it will not be construed in accordance with strict rules. Its substance or import will be mainly considered in determining whether it is sufficient. Mere informalities will not be regarded. The description of the premises where it is proposed to conduct the business is

sufficient, if so reasonably full and certain as to indicate the exact location. (Black, Intoxicating Liquors, sec. 156, p. 198, and cases cited.) In the matter under consideration the petition described the location of the proposed business as on lot 12, block 66, of the city. The notice described the same lot and block and gave the same number, and, dropping the "M" designating the street, substituted in its stead the words, "South Thirteenth." The remonstrators, some of them, in their objections filed with the board, remonstrated against "the granting of a license for a saloon on lot 12, block 66," and others, stating that they were freeholders, owners of property in block 66 of Lincoln, remonstrated against the issuance of a license for a saloon to be operated on any lot in above block, from which it is very evident that all persons interested knew from the portion of the description lot 12, block 66, just exactly where the saloon for the opening and operating of which the petition asked a license was to be located, and it does not appear that any one was in any manner or to any extent misled in regard thereto. This being true, the description served the purpose for which it was intended and fulfilled the intention and requirements of the law in respect to it.

Another contention of counsel for plaintiff in error is that the statute requires the application or petition for liquor license must be signed by thirty of the resident freeholders of the ward in which it is expected to conduct the business; and further, that by one of the rules of the excise board it was enacted: "Before the petition or bond, as provided in rule three hereof, shall be filed with the clerk, the applicant shall be re-

quired to procure a certificate of the register of deeds of the county of Lancaster, to be indorsed on said petition, certifying that each of the persons signing the same is a resident and freeholder within the ward where the sale of such liquors is to take place;" that the certificate of the clerk which was indorsed upon the petition merely stated that the signers were freeholders within the Fourth ward and did not state that they were residents; that this was not enough and the board did not acquire jurisdiction to entertain and hear the application, or to issue a license. This question was not raised by the remonstrances against the issuance of the license filed with the excise board. Fairness to all parties would seem to demand that objections to granting a license should be made before the body to which the application is presented, in the first trial tribunal. If not made there, they need or will not be considered in the appellate court. (*Livingston v. Corey*, 33 Neb., 366.)

The judge of the district court, after reaching and announcing the conclusion that the testimony taken at the hearing before the excise board was not authenticated or transmitted to the district court as required by law, and need not be made the subject of inquiry, examined and considered it and passed upon its weight and sufficiency. In one of its findings it was stated by the court that the granting of a saloon license was a matter resting in the discretion of the excise board, governed and controlled by the various provisions of law in relation to the issuance of such licenses, and unless it affirmatively appeared from the evidence that its granting a license for conducting a saloon business at any assigned location was an abuse of

the discretionary power of the board, its order to that effect would not be disturbed. It is urged by counsel for plaintiff in error that the court, by this finding, in effect refused to pass upon this application on its merits, refused to give its judgment as to whether or not a license should be issued, or refused to give the remonstrators a hearing upon the evidence or examine it for the purpose of determining whether a license ought to issue. We do not think the language of the court, when read and considered in connection with the other findings, can fairly be construed to have the meaning stated by counsel. After holding that the testimony introduced before the excise board was not authenticated as provided by law and not properly before the court, it is further said in the findings and decision: "But the court, having fully examined the evidence filed by plaintiff's counsel herein, and heard arguments thereon, finds," and here follow statements from which it clearly appears that all the evidence given before the excise board was considered by the court; that it in effect tried the matter on the same testimony, heard it upon its merits, and made a finding on each of the contested questions, and in each instance reached the same conclusion as did the board. A careful perusal of the whole of the findings and judgment of the court convinces us that the evident meaning of the language used, to which the objection applies, or intended to be conveyed by the court, was that in the matter of the hearing on the application for a liquor license the excise board did not act ministerially, but judicially, and after listening to the evidence, exercised their discretion or judgment in determining whether, in view of all the facts

and circumstances, a license should be granted or refused, and that if the appellate or district court, after scanning all the same testimony, reached a different conclusion on any vital point involved, the decision of the excise board must be reversed as a wrong exercise of the right to decide, of the discretion vested in it, or if the court's conclusions agreed with those of the board, its judgment must also agree. It is clear that the licensing body is vested with discretionary power; that its action is judicial and not merely ministerial. "In far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is vested with a sound judicial discretion, to be exercised in view of all the facts and circumstances in each particular case as to granting or refusing the license applied for. The principle is that the licensing authorities act judicially, and not merely in a ministerial capacity. In determining the nature as well as the existence of this discretion much will depend upon the language of the local statute, and this, of course, should be carefully scrutinized; but the general disposition, under all the diverse forms of statutory provisions, is to leave a wide margin of discretion to the court or board hearing the application." (Black, *Intoxicating Liquors*, sec. 170, p. 211; *State v. Cass County*, 12 Neb., 54.)

It is further urged that the findings and order of the excise board were not supported by the evidence. The testimony was listened to and passed upon by the excise board, and was again investigated and the questions raised decided by the district court. We have carefully studied it and cannot say that the conclusions of the board and of the district court in respect to the points

 Childerson v. Childerson.

involved were manifestly wrong; hence they will not be disturbed. The judgment of the district court is

AFFIRMED.

JOHN W. CHILDERTON V. MARY A. CHILDERTON.

FILED FEBRUARY 18, 1896. No. 6154.

1. **Appeal and Error: ELECTION OF REMEDIES.** Where a case is presented for review to this court within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error and the case will be so considered.
2. **Review Without Bill of Exceptions.** Where the bill of exceptions is not properly authenticated by the certificate of the clerk of the district court, as required by law, it need not be examined by this court.

ERROR from the district court of Clay county.
Tried below before HASTINGS, J.

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, contra.

HARRISON, J.

The plaintiff herein alleges the relationship of husband and wife as existing between himself and the defendant; that, as the outcome of difficulties and dissensions during the course of their married life, the wife left the home and abandoned the plaintiff, and he, as a consideration for her return to him and the family relations and duties and continuance thereof and therein, did, during the

47	162
49	67
50	166
51	618
52	411
54	500
54	592

47	162
58	213

year of 1889, convey by deed to the wife certain lands in Clay county, Nebraska; that on or about the 8th day of December, 1891, the defendant violated her promise and contract and again departed from the home of the parties, and abandoned the plaintiff, by which act he became entitled to the property conveyed to her. Hence he prays a decree against her, requiring its reconveyance to him. The wife, in answer to the pleas of the plaintiff herein, admits the assumption of the marriage relation by and between plaintiff and herself, and that after some years of married life disagreements and contentions arose and prevailed, and finally to such an extent that she forsook the home and her marital rights, and also the duties, or was forced so to do, but she affirmatively states that at the time of the marriage to plaintiff she was the owner of certain property, both personal and real, the proceeds of which the plaintiff reduced to his possession and used in such manner and for such purposes as he desired, and the lands which the plaintiff conveyed to her were so conveyed to her in payment and to reimburse her for the appropriation of the proceeds of her separate property. To this answer of defendant there was filed a reply which in effect denied the affirmative matter contained therein or avoided its force, and reasserted the substantive matters set forth in the petition in so far as it related to the consideration for the conveyance of the lands from plaintiff to defendant. At the close of the trial of the issues the court rendered a decree favorable to defendant, by which the action was dismissed and the costs taxed against the plaintiff, and the case is presented here for review.

The record here is entitled as in an appeal, but a petition in error was filed and a summons in error was caused to be issued. Under such circumstances it will be presumed that the plaintiff has elected to present the case to this court by error proceedings. (*Woodard v. Baird*, 43 Neb., 311; *Monroe v. Reid*, 46 Neb., 316; *Burke v. Cunningham*, 42 Neb., 645.) If this is treated as an error proceeding, then the errors assigned in the petition cannot be reviewed, for the reason that no motion for a new trial was filed in the district court. Where a party does not move for a new trial in the lower court, he cannot raise any question on error to this court. (*Zehr v. Miller*, 40 Neb., 791, and cases cited; *Brown v. Ritner*, 41 Neb., 52; *Scroggin v. National Lumber Co.*, 41 Neb., 195; *Appelget v. McWhinney*, 41 Neb., 253.) The transcript in the case at bar was filed within the time for effecting appeal to this court, and if we were at liberty under the rules to consider it as an appeal, the questions raised and discussed in the brief of counsel for the unsuccessful party in the trial court all depend for their proper understanding and decision on an examination and consideration of portions of the evidence introduced at the trial. This necessitates in any case the presentation of the evidence to this court, properly preserved in a duly authenticated bill of exceptions, and in the absence of such bill of exceptions the evidence need not be investigated. There was no certificate of the clerk of the district court attached to what purported to be the bill of exceptions. It was not legally authenticated and is not properly before this court. (*Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402; *Felber v. Gooding*, 47 Neb., 38.) We

McAuley v. Cooley.

have, however, reviewed the testimony, and our conclusion is that, as to the points argued by the complaining party, it is conflicting, but sufficient to sustain the findings and judgment of the trial court, and had the case been suitably presented here for review as to such questions, the findings and judgment would not have been disturbed or reversed. The judgment of the lower court is

AFFIRMED.

W. S. MCAULEY ET AL. V. J. H. COOLEY.

47	165
51	128

FILED FEBRUARY 18, 1896. No. 5305.

1. **Partnership: DISSOLUTION: ACTION AT LAW BETWEEN PARTNERS.** The decision in relation to certain questions in this case, which were announced in a former opinion, for a report of which see 45 Neb., 582, herein reaffirmed, and having been stated in the syllabus, will not be here restated.
2. **Principal and Surety.** Parties who signed the bond of one of the members of a copartnership, conditioned for the due and faithful performance of his duties, in and concerning the business in which the firm engaged, *held*, not released from their obligation thus assumed, by an increase in the amount of the capital invested in the business.

REHEARING of case reported in 45 Neb., 582.

Capps & Stevens, John M. Ragan, and J. B. Cessna,
for plaintiffs in error.

References as to non-liability of sureties: *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *Grant v. Smith*, 46 N. Y., 95; *Walrath v. Thompson*, 6 Hill [N. Y.],

540; *Dobbin v. Bradley*, 17 Wend. [N. Y.], 422; *Bonser v. Cox*, 4 Beav. [Eng.], 379; *Zimmerman v. Judah*, 13 Ind., 286; *Judah v. Zimmerman*, 22 Ind., 388; *Lee v. Dick*, 10 Pet. [U. S.], 482; *Edmondston v. Drake*, 5 Pet. [U. S.], 624; *Osborne v. Van Houten*, 8 N. W. Rep. [Mich.], 77; *Woodworth v. Anderson*, 19 N. W. Rep. [Ia.], 296; *Sage v. Strong*, 40 Wis., 575; *Henderson v. Marvin*, 31 Barb. [N. Y.], 297; *Farmers & Mechanics Bank v. Evans*, 4 Barb. [N. Y.], 487; *Lang v. Pike*, 27 O. St., 498; *Wassenick v. Ireland*, 9 S. W. Rep. [Tex.], 203.

B. F. Smith, contra.

HARRISON, J.

In October, 1888, J. H. Cooley and George A. Bentley formed a copartnership, and under the firm name and style of J. H. Cooley & Co. engaged in the business of dealing in lumber and coal in the town of Holstein, this state. The firm continued its operations until on or about July 31, 1889, when it was dissolved. The written agreement or contract for the formation of the partnership, and to govern in conducting its affairs, was, in part, as follows:

“Articles of agreement, made and entered into this 12th day of October, 1888, by and between J. H. Cooley, of Kenesaw, and G. A. Bentley, of Holstein, Nebraska, as follows:

“The said parties above named have agreed to become copartners in business and by these presents do agree to be copartners together under the firm name of J. H. Cooley & Co. in buying, selling, and vending of lumber, lath, shingles, coal, and other business of like nature, and to that end the said J. H. Cooley shall contribute a stock of lum-

ber, lath, shingles, coal, real estate, and improvements, etc., for which the whole investment shall not exceed three thousand (\$3,000) dollars, and is not required to do any more work than he shall elect, and the said G. A. Bentley shall, and he is hereby firmly bound to give all his time and use his best efforts to promote the interests of this business.

"The said G. A. Bentley is to keep the books of the firm in a careful and workmanlike manner, and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business, and G. A. Bentley be allowed to draw his personal expenses, not to exceed the sum of forty (\$40) dollars, which amount shall be charged to his personal account and come out of his share of the profits."

W. S. McAuley and Charles H. Furer signed a bond with George A. Bentley as principal, by which they obligated themselves as follows:

"Whereas, on the 12th day of October, 1888, the above named G. A. Bentley and the said J. H. Cooley entered into a copartnership for the purpose of carrying on business of lumber, coal, etc., in the village of Holstein, in the county of Adams, in the state of Nebraska:

"Therefore the condition of this obligation is such that if the above named G. A. Bentley shall do and perform all the acts of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly according to its

spirit and terms, then these obligations to be void, otherwise to remain in full force and effect."

The present action was instituted by J. H. Cooley against the plaintiffs in error upon the bond which they had signed, the object being to recover the aggregate amount of sums which it was claimed had been paid to Bentley, and of which he had made no entry in the books of the firm, and for which he had failed to account. Defendant in error was successful in the district court, and to reverse the judgment there rendered in his favor the parties sureties on the bond presented the case to this court by petition in error. On hearing in this court the judgment of the trial court was affirmed. (For report of the decision then announced see 45 Neb., 582.) A motion for a rehearing was filed, which was sustained, and the cause has been reargued and again submitted for our consideration and adjudication.

The conclusion of the former decision in relation to the dissolution of the firm and accounting or settlement of its affairs between the partners, and the right of defendant in error to maintain an action at law, were not attacked at the present hearing, and, without discussion or further notice now, they will be adopted and reaffirmed.

The argument of counsel for plaintiffs in error on rehearing was an effort to maintain the proposition advanced by them that there had been such a modification of the contract of partnership by the parties to it as released the sureties on the bond which was executed with reference to and reliance upon such contract, and its performance in strict accordance with its terms. The facts in respect to the modification or change which it is claimed was made in the agreement are as fol-

lows: It was stated in the contract that "J. H. Cooley shall contribute a stock of lumber, lath, shingles, coal, real estate, and improvements, for which the whole investment shall not exceed three thousand dollars;" and he put into the business, property and money to the amount of, in round numbers, \$5,000. It is urged on behalf of the plaintiffs in error that, inasmuch as the obligation of their bond was that Bentley should "do and perform all the acts required of him by the written contract, and carry out the obligations therein required of him strictly according to its spirit and terms," that the terms of the contract became of the substance of the bond, and if it was changed in any material particular without the consent of the sureties, it effected their release; that the change in the amount invested by Cooley was a material one; that thereby greater opportunity was afforded the principal in the bond to commit the alleged acts by which it is claimed the damages sought to be recovered in this suit were occasioned; that the sureties may have thought that Bentley could successfully manage a business in which was invested \$3,000 and were willing to become responsible for his acts in and concerning such a business and not one in which there was to be handled a larger amount. They state that the theory upon which their argument is based is that the articles of copartnership and the bond must be construed together as one instrument in determining the liability assumed by the parties who signed the bond. The rule of law relied upon by counsel for plaintiffs in error, as stated in their briefs, is that in determining the liability of a surety it must be borne in mind that he is a favorite of the law, and

has a right to stand upon the strict terms of his contract, when such terms are ascertained. A surety is bound for the due performance by his principal of the precise contract to which the guaranty referred, and if that contract has been changed or modified, without the consent of the surety, he is discharged. This is an established doctrine, and variously worded it has been applied by the courts, both federal and state. It has been recognized and applied in this state. (See *Curtin v. Atkinson*, 36 Neb., 110; *Crane v. Specht*, 39 Neb., 125.) Accepting and proceeding according to the theory advanced for plaintiffs in error in respect to construing the bond and contract in this case as one instrument, there must, conjointly with the rule of law quoted in regard to sureties and applicable to their obligation, be applied one which is here equally as forcible and proper. Another rule, equally binding upon the courts, is that in the construction of a contract of a surety, as well as of every other contract, the question is, what was the intention of the parties as disclosed by the instrument, read in the light of the surrounding and attendant facts and circumstances? (1 Brandt, *Suretyship & Guaranty*, sec. 80; *Lionberger v. Krieger*, 4 West. Rep. [Mo.], 431.) The bond and contract involved in this action, when considered together, and viewed in the light of the facts and circumstances surrounding and attendant upon their inception and existence, when fairly and reasonably construed, seem to indicate that the limit placed by the terms of the contract of partnership upon the amount of capital to be at its beginning invested by Cooley was for his benefit and might be waived by him in favor of a larger sum if he so desired. That it was in direct

contemplation of the parties that the business might grow and increase in volume, and necessarily in the capital to sustain it in its larger workings, appeared in and was directly provided for in the contract, wherein it is stated that Bentley was to do "all the work required to be done in the business, as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business," and certainly it must have been clear to and within the expectation of all the parties to both contract and bond that if the business was successful the principal in the bond would have the management and handling of a capital considerably more than \$3,000 during the times when the profits remained for longer or shorter periods mingled with the other funds in the business. The increase in the investment may have rendered the duties devolving upon Bentley, the principal in the bond, to some extent more arduous and laborious, but it did not effect any change in the character or nature of the acts to be performed by him, and for the due performance of which the sureties were bound. The acts he was obliged to do were the same. The province of his duties was not changed, though the subject-matter was increased, which was possible at all times by additions of profits, and for the damages which accrued through the failure of the principal in the bond to perform acts included and covered by the obligations of the bond, the sureties were and remained bound. (*Eastern R. Co. v. Loring*, 138 Mass., 381; *Rollstone Nat. Bank v. Carleton*, 136 Mass., 226; *Bank of Wilmington v. Wollaston*, 3 Harring. [Del.], 90; *London, B. & S. C. R. Co. v. Goodwin*, 3 W. H. & G. [Eng.], 320; *Strawbridge v. Baltimore & O. R. Co.*, 14 Md., 360; *Gausson v.*

First Nat. Bank of Greenwood v. Cass County.

United States, 97 U. S., 584; *Exeter Bank v. Rogers*, 7 N. H., 21; *Lionberger v. Krieger*, 4 West. Rep. [Mo.], 431.) Whether the recovery could be for more than the \$3,000 we are not called upon at this time to discuss and do not express any opinion, as the amount recovered was much less than that sum. The judgment of the district court is

AFFIRMED.

RAGAN, C., not sitting.

FIRST NATIONAL BANK OF GREENWOOD V. CASS
COUNTY ET AL.

FILED FEBRUARY 18, 1896. No. 6148.

Review Without Bill of Exceptions. Where the bill of exceptions purporting to contain the evidence in a case is not authenticated by the certificate of the clerk of the trial court, it is not properly before this court and will not be examined, and assignments of error depending upon matters of evidence cannot be decided.

ERROR from the district court of Cass county.
Tried below before CHAPMAN, J.

Marquett, Deweese & Hall, for plaintiff in error.

Byron Clark and H. D. Travis, contra.

HARRISON, J.

This is an action by Cass county and its county treasurer against the plaintiff in error, hereinafter called "the bank," to recover the sum of \$551.79, alleged to be due as interest on county

funds on deposit with the bank under the provisions of the act of the legislature of 1891 entitled "An act to provide for the depositing of state and county funds in banks." (Session Laws, 1891, p. 347, ch. 50.) The petition stated the corporate character of the county and also of the bank; that Louis C. Eickoff was the duly elected, qualified, and acting county treasurer of the county, and collected and had the custody and control of the moneys and funds of the county. The proposition, and its terms, of the bank to the county for the reception of county funds on deposit, its acceptance, the presentment and approval of the bond as required by the law, and the deposit by the treasurer of the funds of Cass county in the First National Bank of Greenwood in accordance with the terms of the contract, were pleaded, also the failure and refusal of the bank to pay the interest agreed upon, in the sum of \$551.79. The bank filed an answer as follows: "Now come the defendants and for answer to plaintiffs' petition deny that they owe the plaintiffs \$551.79, interest on the county funds deposited with the First National Bank of Greenwood by the county treasurer of Cass county, or any other sum, but on the contrary allege the fact to be that the defendant, the First National Bank of Greenwood, Nebraska, has paid to the county of Cass, through its county treasurer, all of the interest due and owing to the said county upon county funds so deposited with the said First National Bank of Greenwood, Nebraska." To this answer there was in reply a general denial. A trial of the issues resulted in a verdict and judgment against the bank, and in its behalf the case is presented here for review.

It is contended by the bank that the evidence

adduced in the case disclosed that the major portion of the demand upon which the action was based was composed of interest on state funds, or money collected by the county treasurer of the taxes levied for state purposes, and the other of interest on school district moneys and the district road fund; that these are not current funds belonging to the county, and that the law under which the transaction herein involved was made only provides for the deposit by the treasurer "of money in his hands belonging to the several different current funds of the county treasury," and that no recovery could be legally had of interest on a deposit of any other than current funds, hence none could be allowed in this case. It does not appear from the pleadings that interest is claimed herein on other than "county funds," and the disposition of the contention on behalf of the bank calls for an examination of the testimony, for which reference must be made to a bill of exceptions. The document attached to the record in this case, which purports to be the bill of exceptions, is not identified as such by the certificate of the clerk of the trial court, and is not, therefore, authenticated as required by law, and, as a general rule, the evidence not being properly before the court, will not be examined, and questions raised which depend upon matters of evidence cannot be decided. It follows that the judgment of the district court must be

'AFFIRMED.

NATHAN J. BURNHAM V. FRANK J. RANGE.**FILED FEBRUARY 18, 1896. No. 5930.**

- 1. Attachment: AFFIDAVIT.** An affidavit for an attachment setting forth the grounds therefor in the language of the statute is sufficient.
- 2. Garnishment.** Error cannot be predicated by a judgment debtor upon the making of an order upon a garnishee to pay money into court, or the refusal to vacate such order, when such debtor disclaims any interest in the money garnished.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Slabaugh & Rush, for plaintiff in error.

Parke Godwin, contra.

NORVAL, J.

Plaintiff recovered a judgment in the court below against defendant in the sum of \$79.90 and costs of suit, and Frank E. Moores, garnishee, was ordered to pay into court the money garnished in his hands. At the commencement of the action plaintiff filed an affidavit for attachment, and an order of attachment and notice in garnishment, directed to Frank E. Moores, were issued and served. Subsequently the defendant moved the court to discharge the attachment upon two grounds: (1) The facts stated in the affidavit are insufficient to justify the issuing of the writ; (2) because the affidavit is untrue. This motion was overruled. After the rendition of the judgment, and the making of the order upon the garnishee to pay the money into court, the defendant filed a motion, which was overruled, to set aside

the order made upon the garnishee. These rulings of the court are assigned for error.

No error was committed in overruling the motion to dissolve the attachment. The affidavit for attachment is in the usual form, the grounds for attachment being set forth in the language of the statute, viz., "that said defendant fraudulently contracted the said debt on which said suit has been brought." This was sufficient to sustain the writ, without a statement of the facts showing the ground of attachment to be true. (*Hilton v. Ross*, 9 Neb., 406; *Steele v. Dodd*, 14 Neb., 496.) The affidavit read at the hearing on the motion to dissolve the attachment failed to deny the existence of the debt which is the basis of the suit, or to disprove the averments in the attachment affidavit that the debt was fraudulently contracted. The ground for attachment is nowhere denied. The evidence adduced in support of the motion was merely for the purpose of showing that the moneys garnished in the hands of Frank E. Moores were held by him in his official capacity as clerk of the district court; but such evidence does not disclose that the moneys did not belong to the attaching defendant. Moreover, it is stated in substance, in the motion to set aside the order on garnishee, as well as in brief of plaintiff, that the moneys garnished did not belong to Burnham, and that he had no interest therein. If this be true, the latter certainly cannot complain that it was applied to pay the judgment against him. (*Langdon v. Martin*, 10 O. St., 439; *Mitchell v. Skinner*, 17 Kan., 563.) Moores, to protect himself, could have objected, but he makes no complaint of the order of the court.

Hickman v. Layne.

It is insisted that there was error in denying the motion to vacate the order on the garnishee, because the garnishee did not answer in the case, and further, that as the money was held by Moores as clerk of the district court, it was *in custodia legis*, and, therefore, not subject to garnishment. Whether the order was made upon the garnishee without his appearing and disclosing the amount of money in his hands belonging to the defendant, or whether the moneys in the hands of Moores could be garnished in this case, are immaterial inquiries in the light of this record. Plaintiff having disclaimed any interest in the moneys ordered paid over by the garnishee, both upon the record and in his brief, clearly he cannot be heard to complain that the order was erroneous. No prejudicial error having been shown to exist, the judgment of the district court is

AFFIRMED.

 ISAAC N. HICKMAN V. JOHN LAYNE ET AL.

FILED FEBRUARY 18, 1896. No. 6005.

1. **Action on Contractor's Bond for Price of Material Used in Public Building:** JUDGMENT FOR SURETIES. Evidence examined, and *held* to support the verdict.
2. **Instructions: ASSIGNMENTS OF ERROR.** Instructions given and refused not reviewed because insufficiently assigned for error in the motion for a new trial.
3. **Trial: EVIDENCE: MISCONDUCT OF JURY.** Plaintiff introduced in evidence an itemized account of materials furnished, which the jury took to their room when considering of their verdict. *Held*, Not prejudicial error.

47	177
47	817
47	177
49	673
53	293
53	476
153	715
54	662

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4. **Review: EVIDENCE.** Error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection.
5. **Opening and Closing.** The party upon whom rests the burden of the issue is entitled to open and close the evidence and arguments to the jury on the trial of the cause.
6. ———. Where the party holding the affirmative waives the opening argument to the jury, he is not thereby deprived of closing the case, after his adversary has made his argument.

ERROR from the district court of Lancaster county. Tried below before HALL, J.

John M. Stewart and William Leese, for plaintiff in error.

Pound & Burr, contra.

NORVAL, J.

This action was brought upon the bond hereinafter mentioned by Isaac N. Hickman against John Layne and Fred W. Krone, partners as Layne & Krone, George Martin, N. Westover, George Sherer, A. B. Beach, J. E. Stockwell, N. N. Menard, Fred Voight, and W. Henegan to recover for materials alleged to have been sold and delivered to Layne & Krone by one John Ellis, and used by them in the erection, for the state, at Beatrice in 1887, a building for the institution for the feeble-minded. Layne & Krone entered into a written contract with the board of public lands and buildings to furnish the materials and labor and to erect said building for a stipulated price, payable as the work progressed on the monthly estimates of the superintendent of construction, which contract contained a provision to the effect that Layne & Krone should pay off and settle in

full with all parties entitled thereto claims that should become due by reason of labor and materials furnished or used in the construction of the building. A bond for the faithful compliance with the contract was given to the state by Layne & Krone, which was also signed by the other defendants, some of them as sureties and others as witnesses to its execution merely. This bond, with the exception of the parties, date, and amount of the penalty, being identical with the one involved in *Sample v. Hale*, 34 Neb., 220, will not be set out in this opinion. Subsequent to the execution of the bond and contract aforesaid John Ellis furnished the contractors the stone and concrete used in the building, amounting to \$2,124.16, upon which has been paid \$1,902.02, and no more, leaving a balance due therefor of \$222.14. The account for the materials so furnished has been duly transferred by Ellis to this plaintiff, who brings this action to recover said balance against the principals and sureties upon said bond. Layne interposed no defense. The other defendants answered the petition by a general denial, and as a second defense alleged that prior to the furnishing of the materials, for which compensation is demanded, the firm of Layne & Krone had dissolved, said Krone retiring from the firm, of which plaintiff and his assignor had knowledge and notice, and that Layne alone is liable for the payment of said materials. By stipulation of the parties in open court the jury returned a verdict for Menard, Voight, and Hene-gan, they having signed the bond as witnesses. The jury found for plaintiff against the defendant Layne for the full amount claimed, and also in favor of the other defendants.

That the bond given to the state inured to the benefit of the subcontractors of Layne & Krone, and that such subcontractors could maintain an action for a breach of the conditions of the bond, is settled by repeated decisions of this court. (*Sample v. Hale*, 34 Neb., 220; *Habig v. Layne*, 38 Neb., 747; *Lyman v. City of Lincoln*, 38 Neb., 794; *Doll v. Crume*, 41 Neb., 655; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Kaufmann v. Cooper*, 46 Neb., 644.) The first question, therefore, to be considered is whether the materials, for the value of which this suit is brought, were furnished by plaintiff's assignor, Ellis, to the firm of Layne & Krone or under a contract with them, or to John Layne alone on his individual account. The partnership of Layne & Krone was dissolved on November 9, 1887, the defendant Krone retiring from the firm, and the business was thereafter conducted by Layne in his own name, who completed the building. A considerable portion of the materials had already been furnished by Ellis at the date of said dissolution, and payment therefor has been made. The amount claimed in this action is for a part of the materials delivered since November 9. It is claimed by plaintiff in argument that all the materials were delivered under a contract entered into by Ellis with Layne & Krone about October 1, 1887, and during the existence of the partnership. This the defendant insists is incorrect. The testimony on behalf of the plaintiff adduced on the trial, and which is embodied in the bill of exceptions, fully sustains the theory and contention of the plaintiff. On the other hand, the inference could be properly drawn from portions of the testimony of the defendant Layne that no contract was made with his

firm, whereby it agreed to furnish any certain amount of stone for the erection of the building; that prices were named on the different kinds of stone, but the firm did not agree to take, nor did Ellis agree to deliver what stone should be required to complete the building or any part thereof; that the stone was ordered as it was needed from time to time; that after the dissolution in the name of Layne, and a portion of this was paid by the individual check of the latter. While the testimony of this witness is in some particulars weak and evasive, we cannot say that the jury were not warranted in finding that the materials in dispute were not furnished under and in pursuance of a contract with the firm of Layne & Krone, although the preponderance of the evidence would have justified a different conclusion. In this connection it may not be amiss to state that no express contract with Layne & Krone for the furnishing of the materials is averred in the petition, the allegation being that they were furnished at their request. It is true, as argued by counsel, that partners are not released from unfulfilled contracts and obligations by the dissolution of the firm. Such was the decision in *Swobe v. New Omaha Thomson-Houston Electric Light Co.*, 39 Neb., 587. But this principle could only be invoked by the plaintiff in case he established that Layne & Krone agreed with Ellis to take from him all the stone required for the erection of the building, and all that was received was delivered under such agreement. The jury having found against the plaintiff on the facts, the principle of law invoked by plaintiff that partners cannot by dissolving release themselves from unfulfilled contracts is not applicable to the case under consideration.

Complaint is made in the brief of the third and fourth instructions given by the court on its own motion, and the refusal to give the plaintiff's third, fourth, and sixth requests. The court's charge consists of five separately numbered paragraphs, and the giving of them all, as well as the three requests refused, is assigned for error in the motion for a new trial as follows:

"5. The court erred in giving paragraphs of instructions numbered 1, 2, 3, 4, 5 on its own motion.

"6. The court erred in refusing to give paragraphs of instructions numbered 3, 4, and 6, asked by the plaintiff."

The first and second instructions were properly given. The first briefly stated the nature of the action, and the second told the jury that, under the stipulation of the parties, they should return a verdict for Menard, Voight, and Henegan. There being no error in either of these instructions, the fifth subdivision of the motion for a new trial was not well taken. It is needless to cite authorities in support of this familiar rule.

Plaintiff's fourth request was as follows: "If you find from the evidence that the plaintiff entered into the contract with Layne & Krone to furnish the material sued for prior to a dissolution of such firm, but did not deliver the same until after a dissolution, both Layne & Krone, together with the sureties on their bond to the state, would be liable for any balance due plaintiff for such material." The doctrine enunciated in this instruction is clearly expressed in the fourth paragraph of the charge to the jury. It was not error to decline to repeat it. The request being properly denied for the reason stated, the assignment based upon the refusal of instructions must

be overruled without considering the other requests of which complaint is made.

Plaintiff introduced in evidence his itemized account of the stone furnished, and over his objection the jury were permitted to take the same to their room when considering of their verdict. Error is assigned upon this action of the court. We fail to comprehend how plaintiff could have been prejudiced by allowing the jury to inspect the account, since it was introduced by himself. True, it was made out against Layne alone, but if plaintiff had any explanation to make concerning that matter he should have done so in his testimony. This he did not do, and this circumstance may have militated against him with the jury. If so, he has no one but himself to blame therefor.

It is next argued that error was committed in permitting the witnesses Coldiron and Cain to give testimony to the effect that the dissolution of the partnership between Layne & Krone was a general subject of conversation in and about the building in question during its erection. To this argument there are two answers. In the first place, while objection was made by plaintiff to this class of testimony, one if not both of the witnesses named testified to the same fact without any objection whatever. Again, the purpose of this testimony was to show that Ellis had notice or knowledge of the dissolution. Whether such evidence was competent or not we shall not determine. It is enough to know that Ellis himself testified that he was cognizant of the report current on the streets that Layne & Krone had dissolved, and it is undisputed that Layne told him of the dissolution soon after it occurred. Plaintiff's assignor having had actual notice of

the dissolution, the testimony of the two persons mentioned, if erroneous, was error without prejudice.

It is finally urged that the trial judge committed an error in refusing to permit counsel for the plaintiff to make the closing address to the jury. It appears from the transcript of the journal entry of the case that after the evidence on both sides was adduced, counsel for the plaintiff waived the opening argument, and after the summing up by counsel for defendants was made defendants objected to plaintiff's counsel making the closing argument, which objection the judge sustained, and an exception was taken to the ruling. Section 283 of the Code of Civil Procedure specifies the order of proceedings in jury trials, which order must be followed unless the court otherwise directs. The sixth subdivision of this section reads thus: "Sixth—The parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence shall have the opening and conclusion." Under this provision the party having the affirmative of the issue, or against whom judgment would have gone had no evidence been introduced, has the right to open and close the argument to the jury. (*Vifquain v. Finch*, 15 Neb., 505; *Rolfe v. Pilloud*, 16 Neb., 21; *Omaha & R. V. R. Co. v. Walker*, 17 Neb., 432; *Osborne v. Kline*, 18 Neb., 344; *Rea v. Bishop*, 41 Neb., 202.) Under the quoted statutory provision and the foregoing authorities, counsel for the plaintiff in the case at bar was entitled to make the opening and closing addresses to the jury had he so desired; but he expressly waived the opening. Did he thereby waive the right to close? We do not so under-

stand the rule and practice to be. Had counsel for defendants waived an argument, then the case would have gone to the jury without any argument whatever. Plaintiff took that chance when he waived his opening. The defendants not having waived argument on their part, the plaintiff has the right to close, notwithstanding he made no opening address. (*Trask v. People*, 151 Ill., 523.) But it is said if plaintiff had made the closing address, he could have replied alone to the argument of defendants' counsel, and as the record does not affirmatively show there was anything to reply to, therefore the ruling was without prejudice. Conceding it to be the rule, without deciding the point, that the closing must be confined to a strict reply to the argument on the other side, and that such matters rest largely in the discretion of the trial court, it does not follow that counsel for the plaintiff, to save his exception, was required to preserve the speech of his adversary in the bill of exceptions in order to make error affirmatively appear. If the verdict was the only one which could have been found under the evidence, then the denial of the right to close would have been without prejudice. In such case there would have been no abuse of discretion. In the case at bar the evidence was sharply conflicting upon the real litigated issue in the case, namely, whether the materials were furnished under a contract with Layne & Krone or to Layne alone upon his own responsibility. Therefore the right to make the closing argument upon the evidence was of no inconsiderable advantage. Had plaintiff's counsel been permitted to close the case, who knows but what his eloquence and logic may not have turned the scales? Much discretion

rests with the trial judge as to the scope of arguments of counsel, either as to time or relevancy, and such discretion will not be interfered with by a reviewing court except where an abuse is shown. Such discretion, however, cannot be extended to the denial of the right to make any argument to a jury where there is a conflict in the evidence or where different conclusions may be legitimately drawn from the facts proven. (*Houck v. Gue*, 30 Neb., 113; *Hettinger v. Beiler*, 54 Ill. App., 320; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill., 126; *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark., 140; *Huntington v. Conkey*, 33 Barb. [N. Y.], 218; *Harley v. Fitzgerald*, 84 Hun [N. Y.], 305.) The denial to plaintiff the right to make the closing argument is a fatal error, for which the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NORWEGIAN PLOW COMPANY, APPELLANT, V.
REUBEN BOLLMAN ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. No. 6034.

1. **Order by Consent: REVIEW.** A party cannot predicate error upon a ruling which he procured to be made.
2. **Transcripts: REVIEW.** The transcript of appeal is the exclusive evidence of the proceedings in the trial court.
3. **Injunction Enjoining Judgment: FRAUD: LACHES.** A court of equity will not enjoin a judgment at law upon the ground of fraud where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.

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APPEAL from the district court of Madison county. Heard below before SULLIVAN, J.

H. C. Brome and R. A. Jones, for appellant.

D. A. Holmes, Reese & Gilkeson, and Robertson & Wigton, contra.

NORVAL, J.

This was a suit to enjoin the collection of a judgment of the district court of Madison county rendered in an action at law wherein Reuben Bollman was plaintiff and H. A. Pasewalk and others were defendants, which judgment was affirmed by this court at the January, 1890, term, the opinion being reported in 29 Neb., 519. The injunction case was dismissed and plaintiff appeals. The order of dismissal is as follows:

“THE NORWEGIAN PLOW COMPANY }
 V. }
REUBEN BOLLMAN ET AL. }

“Now on this 17th day of December, 1892, this cause came on to be heard on the motion of the *plaintiff* for judgment of dismissal upon the issues presented by the pleadings herein filed, and the court being fully advised in the premises sustains said motion, and said cause is dismissed at plaintiff's costs, to all of which rulings and judgment of the court plaintiff at the time excepted,” etc.

It will be observed from the foregoing that plaintiff has appealed from an order sustaining his own motion to dismiss the cause. He having expressly invited this decision to be made, if erroneous, it is his own error, and not the error of the court, and he is thereby precluded from assailing

the ruling. (*Omaha Fire Ins. Co. v. Maxwell*, 38 Neb., 358; *Weander v. Johnson*, 42 Neb., 117.) It may be said the journal entry is incorrect wherein it is stated that the motion to dismiss was made by the plaintiff; that in fact it was defendants' motion. There is nothing in the record to show that such a mistake was made. The motion is not included in the transcript, and the journal entry contains the written approval of the attorneys for the respective parties indorsed thereon, as well as being authenticated by the certificate of the clerk of the trial court. It is well settled that the transcript of appeal is the sole and exclusive evidence of the proceedings in the court below. (*Weander v. Johnson*, 42 Neb., 117; *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb., 233; *Davis v. Snyder*, 45 Neb., 415.) The same result is reached upon a ground less technical. Conceding that plaintiff did not ask the order of dismissal to be made, as counsel in their briefs assume to be the case, yet there must be an affirmance upon the merits, as we shall proceed to show. Before doing this a statement of the issues presented by the pleadings will be necessary to a proper understanding of the case, since the decision was predicated upon them alone.

The petition alleges, in substance, that the defendant Bollman was sheriff of Knox county, and Rothwell was his deputy. The other defendants, Tyrell and Losey, are, respectively, the clerk of the district court and sheriff of Madison county; that the plaintiff recovered certain judgments before a justice of the peace of Knox county against one Fred Fischer, and caused executions to be issued thereon, which were delivered to said Rothwell for collection; that on the same day

plaintiff caused to be executed and delivered to Rothwell an undertaking signed by H. A. Pasewalk, J. S. McClary, and A. P. Pilger, as sureties, for the purpose of indemnifying the sheriff on account of the levy of said executions upon certain goods and chattels, then in the possession of Fischer, but claimed by Deere, Wells & Co. and others. A copy of this bond, as set forth in the petition, is set out in the opinion in 29 Neb., 517, and need not be here given. The petition further avers that the deputy sheriff levied these executions upon, and sold, certain property then in the possession of Fischer, described in Exhibit A, attached to the petition, and applied the proceeds arising from such sale to the payment of plaintiff's judgments; that at the same time Bollman and Rothwell fraudulently and unlawfully, and for the purpose of cheating and defrauding plaintiff, and without his knowledge or consent, or that of the sureties upon the indemnifying bond, took into their possession and converted to their own use certain other property claimed by Deere, Wells & Co., described in Schedule B, attached to the petition, and that no accounting has ever been made to the plaintiff, or said sureties, for the property so taken and converted by said sheriff and his deputy. It is further alleged that subsequently Deere, Wells & Co. brought an action in the circuit court of the United States for the district of Nebraska against said Bollman and the sureties on his official bond, for the conversion of all the goods so taken by the officer, and recovered therein a judgment against the defendants for the sum of \$3,416.65 damages and costs of suit for the goods taken at the request and appropriated to the use and benefit of the plaintiff herein, as well

as for the goods described in said Exhibit B; that subsequently Bollman instituted an action in the district court of Madison county against said McClary, Pilger, and Pasewalk, upon said indemnifying bond, for the purpose of compelling the plaintiff herein to pay for the property described in Exhibit B, and for and on account of the said judgment recovered by said Deere, Wells & Co.; that Bollman in his said action on said bond, for the purpose of cheating and defrauding the Norwegian Plow Company, unlawfully and fraudulently averred that the said judgment of Deere, Wells & Co. was recovered on account and for goods taken by Bollman upon said executions, although in fact said judgment was not obtained for such purpose, as Bollman well knew at the time of bringing his suit, but on account of and for the goods described in Exhibit B, as well as for the goods mentioned and set forth in Exhibit A. The petition further charges that Bollman prosecuted his said action to final judgment, recovering therein against Pilger, McClary, and Pasewalk for the sum of \$3,797.87, for the value of the goods, including those converted by him; that the undertaking was for the use and benefit of plaintiff, and that the latter is liable to the sureties for any and all moneys they may be compelled to pay Bollman on account of the giving of said undertaking; that the judgment obtained by Bollman is in full force and unpaid; that plaintiff is now, and at all times has been, ready and willing to account to Bollman for all property taken upon said executions, and to indemnify and save him harmless for all costs and damages resulting from such seizure, and is ready and willing and offers to pay into court for his benefit all moneys

justly due Bollman on account thereof, together with all costs and expenditures incurred by him, which plaintiff ought equitably and fairly to pay on such account; that Bollman and Rothwell are insolvent; that the former has caused execution to be issued upon his judgment and placed the same in the hands of said defendant Losey as sheriff, who threatens to levy the same upon the property of Pilger, McClary, and Pasewalk. The petition contains other averments, which will be adverted to further on.

The defendants, for answer, admit that Tyrell is clerk of the district court and Losey is sheriff of Madison county; that Bollman was sheriff of Knox county and Rothwell was his deputy; admit the recovery of the judgments in the justice court by the Norwegian Plow Company, the levy of the execution by the deputy sheriff upon the goods in the possession of Fischer, the recovery of the judgment by Deere, Wells & Co. in the circuit court against Bollman, the institution of the suit by the latter, and the recovery of the judgment against the sureties on the bond, and deny all other averments of the petition. The defendants also allege that at the time the suit was commenced by Deere, Wells & Co. the plaintiff herein was notified thereof, and employed counsel to defend the same and had exclusive control of the defense therein; and that upon the institution of the said suit against the sureties the Norwegian Plow Company was notified of the fact, employed counsel to defend it, and had full control of the defense and paid all the expenses in connection with the defense of said action.

For reply plaintiff admits that it was advised of the fact of the commencement of the actions

referred to in the petition, denies all other allegations of the answer, and alleges that at the time of the commencement of the action in the circuit court, and at the time of the rendition of the judgment, plaintiff had no notice or knowledge that Bollman or his deputy had converted to their own use a large portion of the property for the value of which said suit was brought, and had no knowledge of such conversion until after the recovery of the judgment sought to be enjoined herein.

Judgment having gone against the plaintiff in the case at bar upon the pleading, in reviewing the decision of the trial court we must regard as true every fact well pleaded in the petition, and that every allegation of the answer, put in issue by the reply, should be taken as not true. In other words, if the facts set up in the petition, taken in connection with the admission of the plaintiff in the reply that it had notice at the time of the pendency of the action of Deere, Wells & Co. against Bollman and that of Bollman against the sureties on the indemnifying bond, were insufficient to entitle the plaintiff to enjoin the enforcement of the judgment in question, the order of dismissal was properly entered.

It is too well settled by the courts of this country to require the citation of authorities in support thereof that in a proper case equity will grant relief against a judgment fraudulently obtained, when a meritorious cause of action or defense is shown. An exception to this general rule is that a judgment at law obtained through the fraudulent conduct of the judgment creditor will not be enjoined where the defense could have been made at law. Stated differently, a court of equity will not interfere because of fraud alone,

but the person aggrieved must make it appear that a good reason existed why the defense was not interposed in the original suit. As stated by Mr. High in his valuable work on Injunctions: "Where defendant has allowed a suit to proceed to judgment without any attempt on his part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transactions on which the suit was founded. So where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained." (1 High, Injunctions, sec. 194.) Applying the principles already stated to the case made by the pleadings, it is plain that plaintiff is not in a position to invoke the aid of equity to prevent the enforcement of the judgment obtained against the sureties upon the ground of fraud. The act of fraud imputed to Bollman and his deputy consisted in converting to their own use certain property of Deere, Wells & Co. at the time of the levying of the executions against Fischer and in suing for and recovering the value thereof against the sureties upon the indemnifying bond. It is true that both in the reply, and one place in the petition, it is stated that plaintiff had no knowledge of such conversion until after the rendition of the judgment in favor of Bollman and against the sureties; but such allegation is inconsistent with the following averment of the petition: "Plaintiff further alleges that prior to the bringing of said action against Pilger, McClary, and Pasewalk, and against this plaintiff, the Norwegian Plow Company offered to account to and pay said defend-

ant Bollman for all the property levied upon by him or by said defendant Rothwell on said judgment in favor of this plaintiff and against said Fischer, together with all damage, costs, or other expenditures occasioned or incurred by said Bollman or Rothwell, or either of them, on account of and for the seizure and sale of property claimed by Deere, Wells & Co. under and by virtue of said executions, and that said defendant Bollman, unlawfully and fraudulently, and for the purpose of cheating, wronging, and defrauding this plaintiff for property so taken and sold, then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said defendants Bollman and Rothwell and converted by them to their own private use."

The foregoing quotation from the petition is an admission, it seems to us, that plaintiff, prior to the inception of the suit in which the judgment sought to be enjoined was pronounced, was fully cognizant of the alleged fraudulent conduct of Bollman and his deputy, of which complaint is now made. If that is not a fair inference to be drawn from said averment of the petition, we are at a loss to know why this plaintiff offered to pay merely for the property seized and sold under the executions, together with costs. He must have been apprised that property belonging to Deere, Wells & Co. other than that applied upon the executions had been taken by the sheriff, and for which the latter claimed compensation, since the petition avers that when the proposition of settlement was made by plaintiff, that Bollman "then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said Bollman and Rothwell and con-

verted to their own use." The allegation of want of notice in the reply must be disregarded, as to the petition alone we must look for the statement of the facts constituting plaintiff's cause of action. Two allegations of the petition in regard to notice or knowledge of the alleged fraud being inconsistent with each other, we must regard as true and give effect to the one which is against the interest of the plaintiff. This is but an application of the rule that a pleading, when attacked by demurrer, and such is the nature of the motion to dismiss, is to be construed most strongly against the pleader. It does not appear that plaintiff exercised due diligence. Having notice of the alleged fraud, he should have urged that as a defense to the suit on the bond of indemnity. We know, although outside of the record before us, from the opinion in *Pascwalk v. Bollman*, 29 Neb., 522, which cannot properly be considered here, that the sureties in their answer interposed the defense that the judgment recovered by Deere, Wells & Co. "was for the conversion of goods by plaintiff and his agents other than the goods taken by Rothwell under said executions."

Moreover, the petition herein is defective for another reason. It contains no averment as to the value of the goods not levied upon by the sheriff which it is claimed he converted to his own use. The petition refers us to Exhibit B for the value of the property, but it is not there stated, except a trifling sum appears opposite a few of the articles alone. For all that this record shows, they may have been of little or no value. It does not appear that the judgment obtained by Bollman exceeded the value of the property sold and applied on the executions in favor of the Norwegian

 Issitt v. Dewey.

Plow Company, including Bollman's damages and costs growing out of the transaction. For this reason there is no equity in the bill. (*Scofield v. State Nat. Bank of Lincoln*, 9 Neb., 316.)

AFFIRMED.

47	196
51	44
52	177
55	24
55	584

47	196
61	201

MARGARET A. ISSITT, FORMERLY MARGARET A. DEWEY, APPELLANT, V. WILLIAM L. DEWEY ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. No. 5664.

1. **Deeds: DELIVERY.** Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose, and with the intent, of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance.
2. **Action to Cancel Deed from Mother to Son: CONSIDERATION: DECREE FOR DEFENDANT.** Evidence *held* to support the findings and decree.

APPEAL from the district court of Gage county.
 Heard below before BUSH, J.

Hugh J. Dobbs, for appellant.

Griggs, Rinaker & Bibb, contra.

NORVAL, J.

This lawsuit is over a house and lot situate in the city of Beatrice, which plaintiff conveyed to her son, W. L. Dewey, one of the defendants, and which conveyance plaintiff seeks by this proceeding to have canceled and the title to the property quieted and confirmed in herself. The trial court,

by its decree, awarded the premises in dispute to the son, subject to a life estate which was given the plaintiff.

The undisputed evidence shows that on the 26th day of September, 1887, the plaintiff, by deed of general warranty, conveyed the property in litigation to defendant W. L. Dewey; that one of the purposes of the plaintiff in placing the title in the name of her son was to prevent her husband, who was living apart from her, from having any interest in the property in the event he should survive her. It is insisted that no consideration is shown for the deed. Mr. Dewey swears that he paid plaintiff \$10 in cash, and agreed to pay future taxes and insurance on the property, which he has so far done; and further, that he has contributed money to plaintiff's maintenance and support. While plaintiff explicitly denies the cash payment of \$10 and the agreement to pay future taxes and insurance, yet it cannot be said that there is an entire lack of proof to establish a good and valuable consideration for the conveyance. Whether it was adequate or commensurate to the value of the property is immaterial, as there is no charge or proof of fraud or undue influence in the case.

It is further argued that the deed was never formally delivered by the plaintiff to the grantee. Upon this branch of the case there is a conflict in the proof adduced on the trial. It is, however, established, without dispute, that plaintiff voluntarily filed the deed for record, for the purpose, and with the intent, of passing title to the grantee. Actual manual delivery and formal acceptance were therefore not necessary to make the conveyance effectual. (*Glaze v. Three Rivers Farmers Mutual Fire Ins. Co.*, 87 Mich., 349; *Cecil v.*

Beaver, 28 Ia., 246; *Palmer v. Palmer*, 62 Ia., 204; *Compton v. White*, 86 Mich., 33; *Bowman v. Griffith*, 35 Neb., 361.)

From a careful consideration of the evidence in the case, we are led to the conclusion that it is sufficient to sustain the decree, and that the *allegata et probata* agree.

AFFIRMED.

JOHN ROMBERG V. GERHARD FOKKEN.

FILED FEBRUARY 18, 1896. No. 5956.

- 1. Bill of Exceptions: AUTHENTICATION.** A bill of exceptions in a cause tried in the district court must be authenticated by the certificate of the clerk of such court, to entitle it to be considered in the supreme court.
- 2. Transcript: MOTION FOR NEW TRIAL.** A paper purporting to be a motion for a new trial cannot be considered, unless certified to in the transcript by the clerk of the district court.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

M. McLaughlin and *J. C. Crawford*, for plaintiff in error.

T. M. Franse and *C. C. McNish*, *contra*.

NORVAL, J.

This is an action at law by a lessee against his lessor to recover damages for the failure of the defendant to put the plaintiff in possession of the leased premises according to the stipulations in

47	198
47	208
47	325
47	398
47	847
47	198
49	67
50	166
50	228
50	310
51	618
52	191
52	627
53	569
54	187
54	500
54	506
54	592
55	472
55	670
47	198
58	680

the lease. From a verdict and judgment against the defendant, he prosecutes error to this court.

A reversal is sought upon two grounds:

1. The verdict is contrary to, and is unsupported by, the evidence.

2. The court erred in the giving and refusing of certain instructions.

The assignment that the verdict of the jury is not sustained by sufficient evidence cannot be considered by this court, for the reason that the bill of exceptions purporting to contain the evidence adduced on the trial is not authenticated. That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court, nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any purpose. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518.) But it may be said the omission of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions by raising no objections thereto in this court. *Yates v. Kinney*, 23 Neb., 648, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction, this court reviews the proceedings of the district court, and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer.

Romberg v. Fokken.

If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment or order sought to be reviewed and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. (*Moore v. Waterman*, 40 Neb., 498; *Otis v. Butters*, 46 Neb., 492; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402.)

There is another reason why this evidence cannot be considered. It has been frequently asserted by this court that the sufficiency of the evidence to support the verdict, as well as errors in the giving and refusing of instructions, must be called to the attention of the trial court by a motion for a new trial. The record shows that a motion for a new trial was overruled by the court below, and while a paper purporting to be such a motion is contained in the transcript, it lacks authenticity. Attached to the transcript is the following certificate:

"STATE OF NEBRASKA, }
COUNTY OF CUMING. } ss.

"I, Emil Heller, clerk of the district court of Cuming county, do hereby certify that the foregoing is a true transcript of the petition, answer, instructions, and journal entries as the same are of record and on file in my said office.

"Witness my hand and the seal of said district court, this 2d day of April, A. D. 1892.

"EMIL HELLER,
"Clerk of the District Court."

It will be observed that the certificate makes no reference to the motion for the new trial, but particularly enumerates which papers contained in the transcript are certified to be true copies of the originals on file. In this condition of the record, we are unable to say that the alleged motion for a new trial included in the transcript is a copy of the one passed upon by the district court, therefore it cannot be considered by us. (*Haggerty v. Walker*, 21 Neb., 596; *Chamberlain v. Brown*, 25 Neb., 434; *Burlingim v. Baders*, 47 Neb., 204.) It follows that neither the instructions nor the evidence can be reviewed. No question which has been argued in the brief is presented by the record. The judgment is

AFFIRMED.

JOHN ROMBERG V. RUDOLPH HEDIGER.

FILED FEBRUARY 18, 1896. No. 5955.

1. **Failure to Authenticate Bill of Exceptions: REVIEW.** In the absence of a certificate of the clerk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition not negatived by the verdict was proven, and that the instructions refused were properly denied.
2. **Instructions: EXCEPTIONS: REVIEW.** Instructions not excepted to when given cannot be reviewed in the appellate court.
3. **Review: ASSIGNMENTS OF ERROR.** The fifth paragraph of the court's charge to the jury not considered, because the giving was not properly assigned for error in either the motion for a new trial or petition in error.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

47	201
47	203
47	397
47	201
49	67
50	810
51	618
55	149

M. McLaughlin and J. C. Crawford, for plaintiff in error.

Uriah Bruner and T. M. Franse, contra.

NORVAL, J.

Rudolph Hediger sued John Romberg in the court below to recover damages alleged to have been sustained by reason of his having been ejected from a certain farm in Cuming county at the instance of the defendant under a writ of restitution on a judgment in an action of forcible detainer, wherein Romberg was plaintiff and Hediger was defendant, after an appeal undertaking had been filed by said Hediger, and after the justice before whom said cause was tried had recalled said writ of restitution. To the petition in the case before us the defendant answered, admitting certain averments therein, and denying others. Upon the trial, plaintiff recovered judgment, and the defendant brings the cause to this court on error.

It is argued that there is an entire failure of proof to sustain the allegation in the petition that the defendant leased to the plaintiff the premises from which he was evicted. Whether this is true or not we are unable to determine, since there is no certificate of the district court authenticating the bill of exceptions. (*Romberg v. Fokken*, 47 Neb., 198.)

Complaint is made in the brief of the refusal of the court to give the following instructions, requested by the plaintiff in error:

"2. You are instructed that the plaintiff has not shown any right of property, or right of posses-

sion, in the premises described in the petition, and you will therefore find for the defendant."

"4. You are instructed that the plaintiff has not shown that he had leased the premises for the year commencing March 1, 1890, nor that he had paid anything for the use of said premises, hence he cannot recover the value of the use of said premises.

"5. Under the evidence and the law in this case, the plaintiff is not entitled to recover more than nominal damages."

These requests to charge can only be considered in connection with the evidence adduced on the trial. The testimony not being properly before us, we are unable to determine whether the trial court erred in refusing to give the above instructions. (*Willis v. State*, 27 Neb., 98.) Error must affirmatively appear. It is never presumed. We must indulge the presumption that there was evidence before the jury which made the defendant's instructions inapplicable.

Objection is made in the brief to the fifth paragraph of the court's charge to the jury, on the ground that it incorrectly states the measure of damages. The assignment relating thereto in the petition in error and in the motion for a new trial is in the following language: "The court erred in giving the first, second, third, fourth, fifth, sixth, and seventh instructions given by the court on its own motion." The first two instructions given, briefly, yet accurately, state the issue in the case. They are free from errors. The fourth instruction correctly stated the rule as to the burden of proof, and counsel has not suggested that it is erroneous. No exceptions were taken in the court below to the giving of the sixth and seventh instructions,

hence they are not reviewable. The assignment of error above quoted not being well taken as to all the instructions mentioned therein, it, under the familiar rule, must be overruled without considering the instruction of which complaint is specifically made in the brief. It is true there is another assignment in the motion for a new trial and petition in error based upon the fifth instruction, but it presents alone the question of its intelligibility. The language in which the instruction is couched is plain and its meaning easily comprehended. If the learned counsel for plaintiff in error regarded the instruction unintelligible, they have been very remiss in not pointing out to us wherein it is so.

The conclusions reached lead to an affirmance of the judgment.

AFFIRMED.

S. C. BURLINGIM V. WILLIAM BADERS.

FILED FEBRUARY 18, 1896. No. 5751.

Transcripts: AUTHENTICATION: INSTRUCTIONS. Where there is no error sufficiently assigned in the petition in error to challenge the attention of the supreme court, except such as are claimed to have arisen upon the alleged giving or refusal to give instructions, an entire failure to authenticate these alleged instructions precludes the consideration of assignments of error with respect thereto.

REHEARING of case reported in 45 Neb., 673.

Ed P. Smith, M. B. Reese, and E. C. Biggs, for plaintiff in error.

Norval Bros. & Lowley, contra.

47	204
47	201
47	204
58	680

RYAN, C.

There is contained a clear statement of the issues and facts herein involved in a former opinion in this case, reported in 45 Neb. on page 673 *et seq.* After the above opinion had been filed there was granted a rehearing, upon which the errors alleged to have occurred have again been argued and submitted for consideration.

The assignments in the petition in error, that "the court erred in admitting evidence over the objection of the plaintiff in error," and that "there was error in excluding evidence offered by the plaintiff in error, to which ruling exception was duly taken," are too indefinite to receive attention. This is also true of the assignment that the court erred in overruling the motion for a new trial. There was sufficient evidence to sustain the verdict of the jury, and, as no good purpose could be subserved by rehearsing it, the general conclusion stated must answer every purpose.

No question aside from the above is presented by this petition in error, except such as are urged with reference to the alleged giving or refusal to give instructions. The authentication which follows the record is as follows: "I, George A. Merriam, clerk of the district court in and for said county, do hereby certify that the above and foregoing contains and is a true and perfect copy of all the pleadings on file and used in said entitled cause, and also, of all of the orders of the court entered of record in said case, as the same appears of record and on file in the clerk's office of said court, and that the attached bill of exceptions is the original bill of exceptions as settled in the

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case. In witness whereof," etc. In this certificate there is no reference to instructions either given or refused, and the assignments pertaining to instructions of either class must therefore be ignored.

The judgment of the district court is

AFFIRMED

**CAROLINE A. ESTABROOK, EXECUTRIX, APPELLEE,
V. SAMUEL G. STEVENSON ET AL., APPELLANTS.**

FILED FEBRUARY 18, 1896. No. 6139.

Landlord and Tenant: TERMINATION OF LEASE ON PAYMENT FOR IMPROVEMENTS: ARBITRATION. In a lease for the term of ten years it was provided that the lessor might terminate the lease at the end of five years by giving sixty days' notice and paying the lessee the value of such improvements as, meantime, such lessee should have placed upon the premises. Before the lessor had the right to give the required notice the lessee assigned his interest in the lease to another party, who in turn made still another assignment of such interest. *Held*, That, upon giving notice as required, the lessor was not bound to pay to the lessee the value of the aforesaid improvements as an indispensable condition precedent to his right to terminate the lease, but that, having tendered in a court of equity payment for the improvements to whomsoever should be found entitled thereto in such amount as upon an accounting should be found due, the court had jurisdiction to declare the lease to have been terminated at the end of five years of its existence and grant full relief between the parties litigant.

APPEAL from the district court of Douglas county. Heard below before DOANE, J.

The facts are stated by the commissioner.

Arthur C. Wakeley, for appellants:

Payment of the sum awarded was a condition precedent to the termination of the lease. (*People's Bank v. Mitchell*, 73 N. Y., 406; *Clemens v. Murphy*, 40 Mo., 122; *Friar v. Grey*, 5 Exch. [Eng.], 584; *Cadby v. Martinez*, 11 Ad. & E. [Eng.], 720; *Pomroy v. Gold*, 43 Mass., 500; *McFadden v. McCann*, 25 Ia., 252; *Goodwin v. Lynn*, 4 Wash. C. C. [U. S.], 714; *Wells v. Smith*, 2 Edw. Ch. [N. Y.], 78; *Porter v. Shephard*, 6 T. R. [Eng.], 665; *Kerr v. Purdy*, 51 N. Y., 629; *Jones v. Barkley*, 2 Doug. [Eng.], 690; *Parmalee v. Oswego & S. R. Co.*, 6 N. Y., 79; *Commonwealth v. Pejepscut Proprietors*, 7 Mass., 399; *Dwiggins v. Shaw*, 6 Ired. Law [N. Car.], 46; *Mccum v. Peoria & O. R. Co.*, 21 Ill., 534.)

Impossibility of performance will not relieve from the consequence of a condition precedent unperformed. (3 Am. & Eng. Ency. of Law, 901; *School Trustees v. Bennett*, 27 N. J. Law, 513; *Jones v. United States*, 96 U. S., 29; *The Harriman*, 76 U. S., 172; *Dermott v. Jones*, 2 Wall. [U. S.], 1; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y., 487; *Youqua v. Nixon*, 1 Pet. [U. S. C. C.], 221; *Mill Dam Foundry v. Hovey*, 38 Mass., 441; *Ford v. Cotesworth*, 4 L. R., Q. B. [Eng.], 134; *Bunn v. Prather*, 21 Ill., 217; *Williams v. Vanderbilt*, 28 N. Y., 222; *White v. Mann*, 26 Me., 368.)

The award was valid, and upon Estabrook's refusal to pay, his right to terminate the lease was at an end. (*Pearson v. Sanderson*, 128 Ill., 88; *Norton v. Gale*, 95 Ill., 533; *Straw v. Truesdale*, 59 N. H., 111; *Garr v. Gomez*, 9 Wend. [N. Y.], 661; *Garred v. Macey*, 10 Mo., 161; *Curry v. Lackey*, 35 Mo., 389; *Leeds v. Burrows*, 12 East [Eng.], 1; *Elmendorf v. Harris*, 5 Wend. [N. Y.], 516.)

Estabrook & Davis, contra:

The award was invalid; and upon the arbitrators' refusal to further act, Estabrook's only recourse was to the courts. (*State v. Jackson*, 36 O. St., 283; *Smith v. Boston C. & M. R. Co.*, 36 N. H., 458; *Peters v. Newkirk*, 6 Cow. [N. Y.], 103; *Falconer v. Montgomery*, 4 Dall. [Pa.], 232; *Passmore v. Pettit*, 4 Dall. [Pa.], 271; *Chambers v. Crook*, 94 Am. Dec. [Ala.], 638; *Emery v. Owings*, 48 Am. Dec. [Md.], 580; *Curtis v. City of Sacramento*, 64 Cal., 102; *Elmendorf v. Harris*, 23 Wend. [N. Y.], 628; *Caldwell v. Dickinson*, 13 Gray [Mass.], 365.)

Reference was also made to the following cases: *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. [N. Y.], 491; *Copper v. Wells*, 1 N. J. Eq., 10; *Berry v. Van Winkle*, 2 N. J. Eq., 269; *Conner v. Jones*, 28 Cal., 59; *Frey v. Campbell*, 3 S. W. Rep. [Ky.], 368; *Montgomery v. Chadwick*, 7 Ia., 114.

RYAN, C.

On May 1, 1884, Experience Estabrook entered into a written contract with Samuel G. Stevenson, by the terms of which Mr. Estabrook leased to Mr. Stevenson the south forty-four feet of lot 1, in block 43, in the city of Omaha, for the term of ten years. Immediately following the description of the term "ten years" there was this language: "Provided that said Estabrook shall have the privilege of terminating said lease at the end of five (5) years by giving sixty (60) days' notice in writing to said Stevenson of his intention so to do, and by paying said Stevenson the value of his improvements, to be determined by arbitrators, one to be chosen by each of the parties hereto, and they to choose a third in the event of disagree-

ment." On January 30, 1889, Mr. Estabrook caused to be served upon Samuel G. Stevenson the following notice:

"To Samuel G. Stevenson Omaha, Neb.—SIR: In pursuance of the terms of your lease made the 1st day of May, 1884, I hereby notify you of my election to declare said lease at an end on the 1st day of May, A. D. 1889, and that I will pay you at that time the value of your improvements, such value to be determined by arbitration as provided in said lease. I hereby nominate as the arbitrator to act in my behalf Mr. James H. Baldwin, of Omaha, who will be ready to meet and arrange with such arbitrator as you may select at such time and place as you may indicate, and who will be present on the ground on said 1st day of May, 1889. You are further notified that the ground covered by said lease, and to which this notice applies, is south forty-four (44) feet of lot one (1), block forty-three (43), in said city of Omaha, Douglas county, Nebraska.

"Dated at Omaha, Neb., January 30, 1889.

"E. ESTABROOK."

Before May 1, 1889, Samuel G. Stevenson selected an arbitrator, one John H. Harte, who, with James H. Baldwin, above named by Mr. Estabrook, on the date therein indicated drew up and signed the following document:

"MAY 1, 1889.

"Messrs. E. Estabrook and S. G. Sterenson, City: We, James H. Baldwin and John H. Harte, have examined buildings Nos. 414 and 416 North 16th street, city of Omaha, and appraise them at thirty-one hundred and 00-100 dollars (\$3,100.00).

"JAMES H. BALDWIN.

"JAMES H. HARTE."

Mr. Baldwin on the day following met Mr. Estabrook, who had meantime heard of the amount agreed upon, and, by the manifested dissatisfaction with the amount fixed, was prevented from giving him a copy of the above award. On the 26th day of September, 1885, Samuel G. and his wife, Mary E. Stevenson, signed, acknowledged, and delivered to Louis Bradford a written assignment of the above mentioned lease. This assignment was filed for record in the office of the county clerk of Douglas county October 1, 1885, and was recorded in book 61 of deeds. On July 8, 1886, Louis Bradford, by an indorsement upon the written assignment to himself, transferred and assigned to Mary E. Stevenson, and at the same time executed to her an unacknowledged quit-claim conveyance of his interest in the parcel of land described in the lease. Neither of these was recorded, and it was shown by the testimony of Samuel G. Stevenson that he never informed Mr. Estabrook that such transfers had been made. At the time the award was made in favor of Samuel G. Stevenson he had, therefore, no beneficial interest whatever in the lease to which, originally, he had been a party. If Mr. Estabrook had paid to Mr. Stevenson the amount of the award made in his favor, of \$3,100, he could have protected himself against being compelled to pay Mrs. Stevenson only by proving that in some way she was represented by her husband in receiving the payment which he did receive, or by showing that he was entitled to credit against her by reason of the want of notice of her interest as assignee of the lease. This Mr. Stevenson, after he had parted with all his rights in the lease, was certainly not in a position to insist upon. On the 9th day of

May, 1889, Experience Estabrook filed in the office of the clerk of the district court of Douglas county his petition, wherein Samuel G. Stevenson and Mary Stevenson were named as defendants. In this petition he copied the aforesaid lease and the notice to terminate the same, and having set out the award and alleged its invalidity for want of precedent notice, he alleged that Samuel G. Stevenson was not the owner of this lease and that he had been unable to discover who was its owner. In this connection the plaintiff alleged that he had always been willing to pay for the improvements the actual value thereof to whomsoever was entitled to receive such payment, and offered to give such bond as the court should require for the payment of any amount found due upon an investigation had between himself and such party as was the holder of the lease in question.

It is insisted by appellants that by the terms of the lease not only was there sixty days' notice required, but there should have been payment of the award of \$3,100 to Samuel G. Stevenson to terminate the lease according to its terms. It is true that the condition precedent seems to have been nominated in the lease, but the manifest injustice of requiring payment to be made to one who, by his own assignment, had constituted himself a stranger to the lease, requires no argument to demonstrate. Samuel G. Stevenson has no right to complain of non-payment to himself under these circumstances, and it requires no Portia's specially borrowed learning to point out that the technical construction which requires payment to Samuel G. Stevenson forbids that this condition for a forfeiture should be extended to any one else. The lease itself, while it provided that pay-

ment for the improvements should be made to S. G. Stevenson, recited that its covenants and agreements should be succeeded to, and be binding upon, the respective heirs, executor, administrators, and assigns of the parties thereto. There was, therefore, open to Mr. Estabrook but one safe course, and that was to implead as defendants in a court of equity such parties as he knew claimed an interest in the lease, and having tendered the performance of his part of the contract in favor of whomsoever was thereto entitled, pray that the lease should be adjudged to have been terminated by his performance of all that it was possible to him to perform. The jurisdiction of a court of equity having been invoked, such a court properly proceeded to the enforcement of complete justice between all parties concerned with respect to the subject-matter involved upon issues duly joined and presented for determination. As was to be expected in making an accounting, on the one hand as to the value of improvements, and on the other as to the liabilities for rents of the premises involved in this litigation, the witnesses differed greatly, but they came as near agreeing in their estimates as witnesses ordinarily do under like circumstances. The court very properly treated the lease as having been terminated on May 1, 1889, and, upon conflicting evidence, made an accounting of the liabilities of each of the litigants which seems to us to have been fully warranted by the evidence, which we need not review. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

LUCINDA MONELL, APPELLEE, v. H. B. IREY,
COUNTY TREASURER, ET AL., APPELLANTS.

FILED FEBRUARY 18, 1896. No. 6074.

Tax Deeds: INJUNCTION TO RESTRAIN ISSUANCE: EVIDENCE.

Where the plaintiff's right to have enjoined the issuance of a treasurer's deed depends upon his affirmatively showing that the sale, pursuant to which such deed is to be issued, was made in violation of an injunction prohibiting it, there must, to entitle to the relief prayed, be evidence of the very essential fact that at the time of the tax sale such decree was in existence.

APPEAL from the district court of Douglas county. Heard below before HOPEWELL, J.

Balliet & Points, for appellants.

Lake, Hamilton & Maxwell, contra.

RYAN, C.

Lucinda Monell, the appellee, brought this action in the district court of Douglas county July 13, 1892, alleging in her petition that she had been the owner of lot 6, block 106, of the city of Omaha for ten years before the commencement of this action, and by virtue of her continued ownership she prayed the relief which afterwards was granted. As her grounds for this relief she alleged that on July 16, 1890, Adam Snyder, the then treasurer of Douglas county, had offered the said lot for sale and had made a pretended sale thereof to the defendants Grant & Grant for an alleged unpaid and special assessment levied and assessed against the said premises by the said city of Omaha in the year 1879 for curbing and gutter-

ing Douglas street, in the said city, and had delivered to said Grants a certificate of sale therefor, and that thereupon the said Grants on the same day had paid to the said county treasurer purported county taxes assessed against said premises unpaid and delinquent for the years 1866 and 1867, and on the 22d of July, 1890, had paid to said county treasurer a purported city tax assessed against said premises unpaid and delinquent for the year 1864. It was further alleged in the petition that at the time the aforesaid paving and guttering tax was levied and assessed in 1879, Gilbert C. Monell was the owner of the aforesaid lot, and that about May 20, 1881, said Gilbert C. Monell brought his action in the district court of Douglas county against W. F. Heins, treasurer of said county, to procure the said paving and guttering tax to be decreed void and to have the collection and enforcement of the same perpetually enjoined, and that in February, 1886, this relief was granted, from which it resulted that a tax sale to Grant & Grant was utterly void and vested said Grants with no title, claim, lien, or interest in said lot 6, block 106, of the city of Omaha. To defeat the right of Grant & Grant to be subrogated to the rights of the county with respect to taxes by them paid after their purchase of said lot, it was alleged that when these taxes were assessed the lot was the property of the Second Presbyterian Church of the city of Omaha and was then used for church purposes. The prayer of the petition in the case now under consideration was that the county treasurer of Douglas county be enjoined from issuing a tax deed to Grant & Grant upon their certificate of purchase, and that the cloud thereby and by the subse-

quently paid taxes be removed, and for general equitable relief. The defendants admitted in their answer that the county treasurer had been correctly named in the petition; that the lot in question had been sold to Grant & Grant; that said firm of Grant & Grant had paid taxes, as in the petition had been alleged, and that notice of the application for the treasurer's deed on said purchase had been given as plaintiff in her petition had alleged. There was in effect a denial of the allegations of the petition not above admitted.

In the decree from which this appeal has been prosecuted there was the following language: "It being unnecessary, in the court's opinion, to a proper decision of the case, no finding is made on the question as to said premises being church property and exempt from taxation during the years 1864, 1866, and 1867, and the court does not determine the same." In respect to appellants' rights as to all the taxes outside the paving and guttering tax we shall follow the line pursued by the district court, and shall consider the case as though the only rights involved were such as depend directly upon the paving and guttering tax.

In the course of the trial in the district court there was by the appellants offered in evidence the county treasurer's certificate showing the sale of the aforesaid lot on July 16, 1890, to Grant & Grant, for \$422.51, the amount of a paving and guttering tax. By the appellee there was offered in evidence the following record:

"GILBERT C. MONELL	}	Decree.
v.		
WILLIAM F. HEINS ET AL.		

"Now come the parties herein by their attor-

neys, and thereupon this cause came on for hearing on the pleadings and evidence and was submitted to the court, on consideration whereof, and all parties consenting thereto, the court do find on the issue joined for the plaintiff and that the plaintiff is entitled to the relief prayed for. It is therefore considered and decreed that the defendants be, and they hereby are, perpetually and forever enjoined from, in any manner, collecting the curb and gutter tax levied on lot 6, block 106, in the city of Omaha, Douglas County, Nebraska. It is further considered that the plaintiff recover from the defendant his costs herein expended, taxed at \$——."

There is neither in this decree, nor in any evidence offered in connection with it, any indication of its date. As this action, upon the theory of the appellee, was only maintainable upon the theory that the enforcement of the paving and guttering tax having been enjoined, the said tax no more justified a sale of the lot than though such paving and guttering tax had never existed, it devolved upon the party relying upon the decree to show that the sale called in question had been made, notwithstanding the fact that this decree was then in existence. No presumption of the performance by the county treasurer of his duty can aid us in this matter, for the presumption that he would not have made a sale in violation of the decree is as strong as any other that can be invoked. It may be, as alleged in the petition, that this decree was entered on May, 1886, but this, with other averments, was put in issue by the answer, and, as has already been stated, there was no showing by proofs what in fact was the date of this decree. There was in evidence, as we have

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seen, a certificate showing the sale for the satisfaction of this paving and guttering tax, and this was not met by proof that at the time of this sale there was in existence a decree that forbade it, and against its validity no other defense has been pleaded. The judgment of the district court is therefore

REVERSED.

IRVINE, C., not sitting.

COMMERCIAL NATIONAL BANK OF OMAHA, APPELLANT, v. MERCHANTS EXCHANGE NATIONAL BANK OF NEW YORK ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. No. 5251.

Estoppel: CHATTEL MORTGAGES: DISTRIBUTION OF PROCEEDS OF SALE: STIPULATIONS. In an action begun to subject goods and the proceeds of sales of goods in the hands of an agent of defendants to the payment of a claim held by the plaintiff against the common debtor of both the plaintiff and the defendants, the plaintiff is *held* not to have disclosed a right superior to that of the defendants by merely showing that the goods and proceeds sought to be reached had originally been taken possession of by an agent of defendants by virtue of defective mortgages, especially in view of the fact that there was subsequent to such possession taken an agreement made by the parties that the action should proceed to judgment according to the rights of each after the proceeds of the sales of the goods had been remitted to defendants, which remittance had accordingly been made, there being no evidence of fraud practiced or participated in by the defendants, against whom judgment is sought for the amount of such proceeds.

APPEAL from the district court of Douglas county. Heard below before WAKELEY, J.

Montgomery, Charlton & Hall, for appellant.

Hall, McCulloch & English, contra.

RYAN, C.

On the 24th of November, 1888, the Commercial National Bank of Omaha filed its petition in this case in the office of the clerk of the district court of Douglas county. The defendants named were the New York & Omaha Clothing Company, the Merchants Exchange National Bank of New York City, the Western National Bank of New York City, M. J. Newman, Richard S. Hall, and James H. McCulloch. The New York & Omaha Clothing Company was described as a Nebraska corporation, and the two New York banks as corporations doing business under the national banking laws in the state of New York. It was averred in this petition that the New York & Omaha Clothing Company had become the debtor of the plaintiff in a large sum, of which over \$5,000 still remained unpaid, and that the defendants R. S. Hall and James H. McCulloch, as a partnership firm of attorneys at law in Omaha, had taken and still retained possession of and were selling all the goods of the clothing company by virtue of its two pretended mortgages to the national banks named, each of which mortgages was to secure payment of over \$20,000. It was also alleged that the clothing company was insolvent.

It was averred by the plaintiff that the aforesaid mortgages had not been executed in such a manner as to create a mortgage lien upon the goods of the clothing company. In the view which we take of this case this contention need

not be considered, for it appears from the averments of the petition, admitted by the answers of all the defendants, that the firm of Hall & McCulloch, as the agent of the two national banks named as defendants, before the petition was filed, had taken possession of the goods sought to be reached, and, from the evidence adduced, that this possession has never been interrupted. As plaintiff sought to assert a right superior to that implied from the possession of the agent of the New York banks, it is necessary to examine carefully plaintiff's description of the origin of this alleged paramount right and to consider whether such right is enforceable under the facts disclosed by the proofs. It must be conceded that the conduct of the clothing company's managers was unfair toward the plaintiff, in leaving it entirely unsecured as it did, and it was quite satisfactorily shown that the credit, upon the faith of which this unsecured debt was created, was procured by false representations. Our concern, however, is with plaintiff on the one hand and the two national banks of New York City on the other.

Plaintiff, to show its right to be paid out of the mortgaged stock of goods in possession of Hall & McCulloch, averred in the petition that about July 3, 1888, plaintiff commenced an action in the district court of Douglas county against the Omaha & New York Clothing Company for the recovery of the amount of the aforesaid indebtedness due from the latter to the former; that in said action an order of attachment was issued and delivered to the sheriff of Douglas county, and together therewith there was likewise issued and delivered a notice in garnishment, which notice was duly served upon the New York banks as garnishees,

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such service being accepted by Hall & McCulloch, as attorneys for the aforesaid garnishees, and that such garnishees had never answered as such. About October 27, 1888, it was alleged in the petition, plaintiff recovered judgment in the action just described for the sum of \$5,454.22; that in due time an execution was issued for the collection of said judgment and was returned unsatisfied for want of goods and chattels of the clothing company whereon to levy. It was averred by plaintiff that at the time its petition was filed in the case at bar there remained in the possession of Hall & McCulloch goods of the clothing company of the value of \$10,000. The prayer of the plaintiff's petition was that there might be issued an injunction to prevent the turning over to the New York banks of the proceeds of sales which had already been made; that Hall & McCulloch might be required to account for the proceeds of such sales and for the goods still in their possession, and for the proceeds of such sales as the said firm might afterwards make; that a receiver might be appointed to take possession of and sell the goods not yet sold and apply the proceeds as the court should direct; that the mortgages to the New York banks should be decreed fraudulent, illegal, and void, and that plaintiff be adjudged to be entitled to be paid out of proceeds of sales of the clothing company's goods. There was duly allowed an injunction, and a bond accordingly was executed and approved. On the 8th day of July, 1889, the firm of Hall & McCulloch filed a motion to dissolve this temporary injunction, accompanied by answers of all the defendants in denial of the material averments by which it had been sought to impeach the validity and good faith of

the mortgages made to the New York banks. Under date of February 27, 1891, the following journal entry appears in this case: "Pursuant to stipulation herein made in open court by the parties hereto, this action is hereby dismissed as to the defendants Hall & McCulloch, and it is ordered that the injunction heretofore granted herein be, and the same is hereby, dissolved, this dissolution to be and have effect as of August 10, A. D. 1890." The above entry in the journal was probably based upon the following quotation from the bill of exceptions evidencing a stipulation with which the trial of this cause began on February 26, 1891: "Pursuant to a verbal agreement made between the plaintiff and the defendants Hall & McCulloch, the Western National Bank, and the Merchants Exchange National Bank, both of New York City, New York, before the answers of the said last named banks were filed, and in view of which they were filed, it is hereby agreed that the injunction heretofore granted be dissolved, and the defendants waive damages on account thereof, and the costs to follow the result of this case on its merits. And the defendants Hall & McCulloch, pursuant to said verbal agreement, having sold such of the property mentioned in the petition as was in their possession at the time of the commencement of this action, and having remitted the proceeds of such sales to the said above named New York banks, upon the agreement that the said New York banks would personally appear and file answers in this case, in which event the said case was to be dismissed as to defendants Hall & McCulloch, and in consideration of which, also, it was agreed that the controversy

should be proceeded with as against the said New York banks, and any judgment which might be rendered be rendered against said banks, provided, on hearing, the plaintiff is entitled to judgment, it is hereby agreed and stipulated that the said action be, and hereby is, dismissed as against Hall & McCulloch. The above stipulation is entered into in open court." There was upon this trial a judgment in favor of the defendants, from which plaintiff appeals.

There was no evidence introduced which tended to show that there was due either of the New York banks less than the amount claimed to be owing each of them, neither was there any attempt to show any unfair means resorted to by these banks either for the purpose of obtaining security for, or payment of, the debt due to each of them. It may be conceded that the mortgages were not executed under a power conferred by the board of directors of the clothing company, as required by its articles of incorporation, and yet, with the assent of the officers of the clothing company, the New York banks, by the firm of Hall & McCulloch, took possession and were selling the goods to pay the debts due them. While Hall & McCulloch were in possession they acknowledged service of a garnishment notice upon the New York banks, their principal, but nothing further was done to render effective this garnishment. In the judgment taken upon the claim of the Commercial National Bank of Omaha against the New York & Omaha Clothing Company there was no mention of the garnishment which had been had of the New York banks. For the collection of this judgment there was issued an ordinary execution, which was returned unsatisfied for want of goods whereon to

levy. In the case at bar there was obtained a preliminary injunction to restrain Hall & McCulloch from paying over to the New York banks the proceeds of sales of goods already, or thereafter to be, made. There was in the petition upon which this injunction was obtained a prayer that Hall & McCulloch be required to account for the proceeds of such sales and that plaintiff be decreed entitled to receive the same. In the oral argument of this case counsel for appellant suggested that instead of pressing the injunction proceeding and that for the appointment of a receiver it was deemed advisable to permit the firm of Hall & McCulloch to proceed to sell, and look to them, rather than to a receiver, for the proceeds of the sales of goods, and that it was upon this theory that the verbal agreement referred to in the stipulation at the opening of the trial had been made. In the stipulation just referred to there was an admission that pursuant to the aforesaid verbal agreement Hall & McCulloch had sold such of the goods as were in their possession when this action was begun, and had remitted the proceeds of such sales to the New York banks upon the agreement that said banks would appear and file their answers in this case, and that upon such answers being filed there should be a dismissal as to Hall & McCulloch and the controversy should be proceeded with as against the banks and a judgment be rendered against said banks if, upon a hearing, plaintiff should be entitled to the judgment.

In view of this stipulation, in which is recited certain acts done pursuant to verbal agreements between the parties, it is quite difficult to determine whether, in advance, it had been orally agreed that Hall and McCulloch might make sales and remittances or not. In any event, appellant

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relies upon this verbal agreement to entitle it to proceed against the New York banks in this action. Whether or not the mortgages to the New York banks were authorized by the board of directors, as required by the articles of incorporation of the New York & Omaha Clothing Company, became immaterial when the plaintiff consented that Hall & McCulloch should sell the goods in their possession and remit the proceeds to their principals. Thenceforward there could be no question made by plaintiff as to the means by which the New York banks had become possessed of the goods of the clothing company, but plaintiff was limited to the question whether or not plaintiff was entitled to recover such proceeds from said banks. If, before this agreement, the garnishment proceedings had not been abandoned, there was by the agreement a complete abandonment of rights predicated upon the garnishment. It admits of grave doubt whether the Commercial National Bank of Omaha, as plaintiff, could recover judgment against the New York banks, as defendants, merely because these latter two banks have been more diligent or more fortunate than plaintiff in making collections from a common debtor, and this, as we understand it, is the sole matter now in controversy in this case. In any event appellant could claim no more than that the banks of another state should be held accountable because of fraud by which had been obtained the advantage which they possess. A careful examination of the evidence convinces us that there was shown nothing in the conduct of the New York banks or their agents which justifies or even tends to justify such an imputation of fraud. The judgment of the district court is

AFFIRMED.

JOHN A. WAKEFIELD V. PETER CONNOR ET AL.,
IMPLEADED WITH LOUIS SCHROEDER, APPEL-
LANT, AND BATES, SMITH & CO., APPELLEE.

FILED FEBRUARY 18, 1896. No. 6077.

Review: CONFLICTING EVIDENCE: MECHANICS' LIENS. There is presented in this case only a question of fact which the district court determined upon conflicting evidence. Its judgment is therefore affirmed.

APPEAL from the district court of Douglas county. Heard below before HOPEWELL, J.

Edward W. Simeral, for appellant.

Meikle & Perley, contra.

RYAN, C.

This action was brought by John A. Wakefield in the district court of Douglas county on March 24, 1890, for the foreclosure of a mechanic's lien on lots 21, 23, 25, 27, and 29, block 4, in Campbell's Addition to the city of Omaha. On March 18, 1892, this lien was paid by a party representing Mr. Schroeder, one of the defendants. A decree was entered October 20, 1892, in which there was determined in favor of Bates, Smith & Co. against Louis Schroeder the sole matter of controversy then in issue. In his answer to the petition of John A. Wakefield, and by way of an affirmative cause of action against the firm of Bates, Smith & Co., his co-defendant, Louis Schroeder, alleged that previous to December 13, 1889, he had been the owner of the lots against which the mechanic's lien was claimed by Wakefield; that about De-

cember 13, 1889, he conveyed said real property to his co-defendant, Michael Donnelly, for the consideration of \$16,500; that at the time said deed was executed Bates, Smith & Co. verbally agreed that, in consideration of said Schroeder waiving his right to the first mortgage and taking a second mortgage to secure payment of the above \$10,500, the said firm of Bates, Smith & Co. would lend said Donnelly the sum of \$16,800, for the sole and only purpose of erecting and completing buildings on the aforesaid lots, taking, to secure payment of said sum of \$16,800, a first mortgage on the property. It was further alleged by Louis Schroeder that Bates, Smith & Co. further covenanted and agreed with him to hold and use all of the said first mortgage loan of \$16,800 in making payments for the erection of said buildings, and that Bates, Smith & Co. covenanted to and did become trustees of that fund for said purpose, the said Donnelly assenting and agreeing thereto. In reliance upon said covenants and agreements of said Bates, Smith & Co. the said Schroeder averred that he was induced to and did accept Donnelly's second mortgage for the purchase price of the lots sold to him, and that, notwithstanding the said covenants and agreements, said firm had wrongfully and fraudulently withheld out of the said \$16,800 the sum of \$9,000, and had diverted said last named sum to its own use. Louis Schroeder further alleged that on May 1, 1890, the contractor, who had undertaken for Donnelly the erection of eight buildings on the above described lots, ceased work because he could not get his pay from Donnelly, who was utterly insolvent, or from the firm of Bates, Smith & Co., and that said Schroeder, to preserve his security and

save said buildings from destruction, was compelled to and did, at his own expense, complete said buildings; that in completing said buildings he had paid \$7,632.75, exclusive of the claim of Wakefield (of \$1,792.57); and that, if all the money in the hands of Bates, Smith & Co. had been rightly and justly used in the erection of said buildings, defendant Schroeder would not have been compelled to pay said sum, or any other amount, for said buildings could have been erected and completed for said sum of \$16,800, the amount of Bates, Smith & Co.'s mortgage. It was further averred that Bates, Smith & Co. had transferred the aforesaid first mortgage to innocent purchasers. The prayer of Louis Schroeder was as follows: "Wherefore defendant prays that an accounting may be had of the amount of money paid by said Bates, Smith & Co. in the erection of said buildings, and that said defendant be decreed to pay to said Schroeder so much of said \$16,800 as was in fact not paid out in the improvement of said property, as said Bates, Smith & Co. agreed to do; and for such other and further relief as in equity and justice he may be entitled to." In the reply of Bates, Smith & Co. there was a denial that such firm had agreed with Schroeder that it would see that the proceeds of the \$16,800 loan would be applied to the payment of any particular class of indebtedness of Donnelly, or upon the construction of the buildings to be erected, and there was a further denial that any sum had been improperly paid or withheld by said firm. The judgment of the district court was, upon conflicting evidence, favorable to Bates, Smith & Co., and as there is presented no other question, its judgment is

AFFIRMED.

47	228
51	99
52	327

47	228
61	753

PHENIX IRON WORKS COMPANY V. H. C. MCEVONY.

FILED FEBRUARY 18, 1896. No. 6112.

1. **Replevin: RESCISSION OF SALE: FRAUD: PLEADING AND PROOF.** A plaintiff in replevin may under a petition alleging generally ownership and right of possession in himself, and a wrongful detention by defendant, prove fraud inducing a previous sale by plaintiff to defendant, and a rescission because thereof. It is not necessary to specially plead the fraud.
2. **Sales: RESCISSION: CHATTEL MORTGAGES.** One who takes a pledge or mortgage of personal property to secure a pre-existing debt is not entitled to protection as a *bona fide* purchaser against an action to rescind a sale of the property previously made to the pledgor or mortgagor. *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, followed.
3. ———: ———: **RETURN OF PURCHASE MONEY.** In general, when a vendor seeks to rescind a sale for fraud he must return or offer to return any portion of the purchase money which he may have received; but he need not do so when the property has been damaged by the fraudulent vendee to an amount equal to the purchase money so received.

ERROR from the district court of Holt county.
Tried below before KINKAID, J.

R. R. Dickson, for plaintiff in error.

H. M. Uttley, contra.

IRVINE, C.

This was an action of replevin by the plaintiff in error against the defendant in error, to recover an engine, boiler, and other machinery. The plaintiff based its claim on former ownership of the property, which had been parted with in pursuance of a contract of sale which the plaintiff

claimed it had been induced to enter into by fraudulent misrepresentations. The defendant, the sheriff of Holt county, denied plaintiff's ownership and right of possession, and also alleged a sale by the plaintiff of the property to one Donald McLean, followed by a pledge of the property to secure a debt of \$700 to one Mathews. The defendant also justified under a writ of attachment issued at the suit of the State Bank of O'Neill against Donald McLean, and levied upon the property subject to the lien of Mathews. The case was tried to the court, and there was a finding and judgment for the defendant.

A question which must be disposed of *in limine* is that presented by the argument of the defendant that the judgment was correct, regardless of any assignments of error, for the reason that the petition did not state a cause of action. The petition was in the ordinary form in replevin cases where a general ownership is claimed, charging merely, in general terms, ownership, a right to the immediate possession of the property described, and the wrongful detention thereof by the defendant. The contention of the defendant is that inasmuch as the plaintiff based its claim on fraud, this petition was insufficient, because not pleading the facts constituting the fraud. The defendant, we think, mistakes the rule. When it becomes necessary to plead fraud, a general allegation of fraud is insufficient. The facts must be specifically pleaded; but it is not in all cases that it is necessary to plead fraud, although that question may turn out to be in issue. In ejectment a defendant under a general denial may prove fraud in the procurement of a deed under which plaintiff claims, for the purpose of disproving plaintiff's right of

possession. (*Franklin v. Kelley*, 2 Neb., 79; *Staley v. Housel*, 35 Neb., 160.) A certain analogy exists between ejectment and replevin under the Code. One is an action to recover the possession of land; the other to recover the possession of personal property; and the pleadings in both actions depart somewhat from the general rules of Code pleading. (See as to replevin, 2 Kinkead, Code Pleading, sec. 1079.) As said in *School District v. Shemmaker*, 5 Neb., 36, the Code takes actions of replevin out of the general rule in regard to pleadings. In *Haggard v. Wallen*, 6 Neb., 271, it was said: "A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same." Where a special ownership only is claimed, greater particularity in pleading is required. (*Curtis v. Cutler*, 7 Neb., 315; *Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771.) But from the time of the early cases cited it has always been considered that a general allegation of ownership, right of possession, and unlawful detention is sufficient, however the plaintiff may deraign his title on the trial; and the reports are full of cases where such petitions have been treated as sufficient, although the proof of the case involved an issue of fraud. That the general rule as to pleading fraud has no application to actions of replevin under the Code was held in *Sopris v. Truax*, 1 Colo., 89. In *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, the petition, after the general allegations, pleaded the fraud specially. In discussing this the court

said that had the pleader stopped at the general allegations "it is conceded that the petition would have been sufficient." This was reaffirmed on rehearing, 42 Neb., 237. The objection so raised by the defendant could hardly in any event go to the general sufficiency of the petition, but would rather go to the admissibility of evidence of fraud thereunder; but however raised, we hold the objection not well taken.

The defendant also contends that the petition in error contains no sufficient assignments to reach the other questions argued. This may be true in a general way, but there is an assignment that the finding was not sustained by sufficient evidence. This we may consider. Most of the facts in the case were settled by a stipulation thereof embodied in the bill of exceptions. From this it appears, among other things, that on September 18, 1890, the plaintiff sold and delivered to Donald McLean the property in controversy, \$700 to be paid during the erection of the machinery, at O'Neill, and the remainder sixty days after erection, the total price being \$2,888. McLean was the president of the Pacific Short Line railroad, and represented that he desired to purchase the property for said railroad, for the purpose of heating and lighting a roundhouse at O'Neill; that he had authority to purchase such property and bind the railroad for the payment; that the railroad was solvent and on a prosperous and solid financial basis. Relying on these representations the plaintiff sold the property. In fact McLean had no authority to purchase for the railroad. He was not acting for the railroad, but for himself. The property was not desired for heating and lighting the roundhouse, but for carrying

on an electric system owned by McLean for lighting the city of O'Neill, and the railroad was insolvent. The plaintiff had no knowledge of the falsity of the representations until shortly before this action was instituted, and after all intervening rights, if any, accrued. The plaintiff put in the machinery according to its contract. About January 1, 1891, the plaintiff received the payment of \$700 from McLean, McLean borrowing the money from the State Bank of O'Neill, the plaintiff knowing that fact, but not knowing that the loan was a personal one of McLean's, and the payment not that of the railroad. McLean then entered into possession of the property with the consent of the plaintiff. In December, 1890, McLean made to Mathews his note for \$2,000. This note was purchased by the bank, which, on December 22, 1891, commenced a suit against McLean thereon and caused the property in controversy to be attached. It was further stipulated that at the time of bringing the action the property had been damaged while in the possession of McLean to the amount of \$900. In addition to the foregoing facts, it appears from parol testimony, and in part by the stipulation, that after the bank had lent McLean the \$700 to make the first payment on the machinery, one of its officers insisted upon security therefor, and some kind of a writing, not disclosed by the evidence, was prepared, whereby the property was pledged to Mathews, the president of the bank, to secure the loan; and there was also some kind of a constructive delivery of the property by McLean to Mathews. There is much controversy in the briefs as to this transaction; but we do not deem its precise nature material, because the same result must be

reached even though there was a complete pledge or mortgage. There is no room for doubt that under these facts a case of fraud was established which would have entitled the plaintiff to recover the property from McLean. McLean procured it on the representation that he was acting on behalf of a solvent corporation purchasing the property for a particular purpose, whereas he was purchasing for himself for another purpose. The corporation was not bound, and was insolvent even if it had been bound. It may be added, also, that there is sufficient to show McLean's insolvency. It has been several times held, directly or by plain inference, that one who takes personal property as security for a pre-existing debt is not a *bona fide* purchaser so as to be protected from the rescission of a contract whereby such property was sold to the pledgor or mortgagor. (*Symms v. Benner*, 31 Neb., 593; *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, 42 Neb., 237; *Work v. Jacobs*, 35 Neb., 772.) The case of *Tootle v. First Nat. Bank of Chadron* is directly in point. The bank, when it lent the money, did not take the property as security. It was only after the loan had been perfected that it sought security. The interval of time was only a day, but that makes no difference. The bank did not part with the money on the faith of this property as security, and the pledge, mortgage, or whatever it was, to Mathews was one to secure a pre-existing debt. The plaintiff has made no offer to return the \$700 received by it; but it is stipulated that the property was damaged to the amount of \$900 while in McLean's possession. A question is thus presented as to whether under the circumstances it was necessary to offer to return the money. We think not. The rule that one, in

order to rescind a contract procured by fraud, must return or offer to return what he has received thereunder, is not one of universal application. In *First Nat. Bank of Barnesville, Ohio, v. Yocum*, 11 Neb., 328, the rule was stated that in such case a party seeking to rescind must put the subject-matter of the contract as near *in statu quo* as may be under the circumstances; or upon the trial must give a reason why the same could not be reasonably done. It is well established that no offer to return is necessary when the party guilty of fraud has rendered a return impossible; and it would seem to be equally true when the party guilty of fraud has rendered a return unjust to the other party. In *Symms v. Benner, supra*, \$100 had been paid on the purchase money; but goods to the value of \$47 had been sold. It was held that an offer to repay \$53 after the value of the sold goods had been ascertained was sufficient; and in *Tootle v. First Nat. Bank of Chadron, supra*, the same doctrine was reaffirmed. If, then, McLean had sold a portion of this machinery to the value of \$900, the remainder might be replevied without offering to return the \$700 received. We can see no difference in principle between the sale of a portion of the property and its deterioration in value by damage or use while in the vendee's possession. Under our view of the law, as above stated, the evidence did not sustain the finding of the court.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. REGINA MARROW, v.
GEORGE W. AMBROSE.

47	235
50	252
56	253

FILED FEBRUARY 18, 1896. No. 7823.

Time to Prepare Bill of Exceptions: NEW TRIAL: MANDAMUS.

Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.

ORIGINAL application for *mandamus* to compel the respondent to sign a bill of exceptions. *Writ denied.*

V. O. Strickler, for relator.

References: *Scott v. Waldeck*, 11 Neb., 526; *City of Seward v. Klenck*, 30 Neb., 775; *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Fleming v. Stearns*, 79 Ia., 258; *State v. Hopewell*, 35 Neb., 824; *Preble v. Bates*, 40 Fed. Rep., 745; *Stocking v. Morey*, 14 Colo., 319; *Cowan v. Cowan*, 16 Colo., 337; *Henze v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 644; *Woods v. Lindvall*, 48 Fed. Rep., 74; *Commissioners of Baltimore County v. Cummings*, 26 Atl. Rep. [Md.], 1111; *Rayl v. Brevoort*, 51 N. W. Rep. [Mich.], 693; *Riddlesbarger v. McDaniel*, 38 Mo., 140; *Hill v. Egan*, 160 Pa. St., 122; *Stonesifer v. Kilburn*, 94 Cal., 33.

William O. Gilbert, contra.

References: *Sohn v. Marion and Liberty Gravel Road Co.*, 73 Ind., 79; *Hicks v. Person*, 19 O., 437; *Kline v. Wynne*, 10 O. St., 223; *Morgan v. Boyd*, 13

O. St., 271; *Donoran v. Sherwin*, 16 Neb., 130; *Wine-land v. Cochran*, 8 Neb., 529; *Jones v. Wolfe*, 42 Neb., 272; *Birdsall v. Carter*, 16 Neb., 422; *Greenwood v. Craig*, 27 Neb., 669; *State v. Walton*, 38 Neb., 496; *Schiels v. Horbach*, 40 Neb., 103.

IRVINE, C.

This is an original application for a writ of *mandamus* requiring the respondent, one of the judges of the fourth judicial district, to settle and sign a bill of exceptions in the case of the relator, Regina Marrow, v. Emily Hespeler, tried before the respondent. An answer to the alternative writ was presented raising issues of fact, and a referee, appointed by the court for the purpose, has made a report of the evidence taken, together with his findings of fact and conclusions of law. The relator moves for a confirmation of this report. The respondent moves to set it aside and for judgment. Our conclusion on one question of law presented by findings of fact which are not attacked, renders it unnecessary to consider any of the other exceptions to the report.

The referee finds that the action of Marrow v. Hespeler was tried at the May, 1894, term of the district court and a verdict returned in favor of the plaintiff, the relator in this action, for \$4,000; that on the same day a motion for a new trial was filed by the defendant, which was on the following day sustained; that the May, 1894, term adjourned July 14, 1894. At the September, 1894, term the cause was again tried, resulting, November 17, 1894, in a verdict for the defendant, and forty days—thereafter extended to eighty days—from the adjournment of that term was allowed for preparing and serving a bill of exceptions that

the September term adjourned January 26, 1895. February 19 Emily Hespeler died, and February 26 William O. Gilbert was appointed special administrator and the action revived in his name. On April 13 the bill of exceptions, which defendants seek to compel the respondent to allow, was served on the defendant, who returned it, refusing to take action for the reason that it had not been served within the time provided by law, and for a further reason not necessary to consider; that the bill of exceptions so tendered contained only the evidence and proceedings on the first trial of the case at the May, 1894, term, resulting in the verdict which was set aside. Final judgment was entered November 17, 1894, at the September term.

It will be observed that the foregoing facts present the question as to whether, when a trial has been had and the verdict set aside, a party seeking to procure a bill of exceptions preserving the evidence on that trial must move in the matter within the statutory period after the first trial, or whether he may wait until final judgment or the overruling of a motion for a new trial after a subsequent trial, and have his bill settled as of the later term. The statute, as it stood when this controversy arose, was, so far as material, as follows: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired."

(Code of Civil Procedure, sec. 311.) By a later clause the judge, for cause shown, may grant forty days' additional time. The question now before us seems to be here presented to this court for the first time, although there has been much controversy from the ambiguity of the statute as to whether the term referred to meant the term at which the verdict was returned, or the term at which the motion for a new trial was overruled. The act of 1895, fixing the latter time, has set this question at rest. (Session Laws, 1895, p. 311, ch. 72.) The course of decision under the old statute, we think, leads to a certain conclusion in this case. There are many decisions holding that the term referred to in the statute is the term at which the verdict was returned, and not the term at which the motion for a new trial was ruled on. (*Monroe v. Elburt*, 1 Neb., 174; *Wineland v. Cochran*, 8 Neb., 528; *Scott v. Waldeck*, 11 Neb., 525; *Donovan v. Sherwin*, 16 Neb., 129; *City of Seward v. Klenck*, 27 Neb., 615, 30 Neb., 775.) In *Dodge v. Runels*, 20 Neb., 33, it was held that where the setting aside of a verdict was saved by the entry of a remittitur at a term following its rendition, the time for settling the bill ran from the later term; but this was placed upon the ground that, had it not been for the remittitur, the verdict would have been set aside and the party seeking the bill would have had no occasion for one. In *State v. Hopewell*, 35 Neb., 822, the court held that the term fixing the time in an equity case was that at which the decision was announced, and not that of its formal entry upon the journal of the court. This is really in line with the first cases cited, and not as the relator contends in support of her position, because in a case tried to the court the findings

take the place of the verdict. The case did not distinguish between the time findings were announced and the time judgment was pronounced on the findings. It quite clearly appears, as is usual in equity cases, that the findings and judgment were concurrent acts. In *State v. Walton*, 38 Neb., 496, a decree of foreclosure was rendered April 18, 1892, and June 26, 1893, a deficiency judgment entered. It was thereafter sought to have settled a bill of exceptions containing the evidence leading to the original decree, but the court held it was too late. This was evidently upon the ground that, although the deficiency judgment only was attacked, it had been the duty of the defeated party to preserve his bill of exceptions within the statutory time after the proceedings which led to the findings fixing his personal liability, and that it was not sufficient to proceed after the final judgment enforcing that liability. This case, therefore, is directly opposed to the relator's contention that she might wait until final defeat and then preserve the record of the first trial. In *Schields v. Horbach*, 40 Neb., 103, it was held that where it is sought to preserve a bill of exceptions embodying the evidence on an interlocutory motion, this must be done within the statutory period after the term at which the motion was ruled on, and not after the trial of the case. We think all these cases lead irresistibly to the conclusion that the term referred to in the statute is, if not the term at which the evidence was taken, at latest the term at which an order was made based on that evidence. It is immaterial to the present case how the old controversy should have been settled, because the trial was here had and the motion ruled on at the same

term. But if any regard is to be paid to the long line of decisions to which we have referred, we must hold that the bill should have been settled within the statutory period after that term expired. The relator argues that such holding imposes an unnecessary burden upon litigants; that, until final judgment, it is uncertain that a party defeated at one step of the case will meet ultimate defeat, and that he should, therefore, be permitted to await the final event before incurring the labor and expense of preparing a bill of exceptions. In support of this argument it is urged that there is in each court a short-hand reporter, who is a public officer, whose notes are public records, and that no difficulty arises in obtaining a true bill even after great lapse of time. The authenticity of the reporter's notes was left in some doubt by *Spielman v. Flynn*, 19 Neb., 342, and *Lipscomb v. Lyon*, 19 Neb., 511; but these cases were explained in *Smith v. State*, 42 Neb., 356, where the true character of the short-hand reporters and their records is discussed. The notes are not public records. The reporter's certificate to a transcript thereof does not authenticate them so as to permit their introduction in evidence. Parties in preparing and the judge in settling a bill of exceptions are not bound by the reporter's transcript. There is, indeed, nothing to require parties to resort to such transcript in the preparation of a bill. The settlement of a bill rests finally upon the judge's determination of what occurred at the trial; and when the accuracy of a proposed bill is properly challenged, the judge must settle the matter in accordance with the truth, and not blindly in accordance with a reporter's transcript. Therefore, the pol-

icy of the law requires that the bill of exceptions should be settled within such reasonable time fixed by statute after the taking of the evidence sought to be preserved, that the parties and the judge may bring to their aid their own recollections; and this is a much more important consideration than the saving to the parties of labor and expense. The referee evidently based his conclusion of law in favor of the relator on the cases of *Scott v. Waldeck* and *City of Seward v. Klenck, supra*. In each it was held that a bill settled after the trial term would be considered to ascertain whether the evidence sustained the verdict. These cases in that feature have for years not been followed in the practice of this court, and to that extent they have been recently expressly overruled by *Jones v. Wolfe*, 42 Neb., 272, and *City National Bank of Hastings v. Thomas*, 46 Neb., 861.

The plaintiff, after the final trial, endeavored to preserve her rights by moving for a rehearing of the first motion for a new trial. This proceeding, however, did not operate to extend her time for settling the bill here presented.

The foregoing considerations dispose of the case. The parties argue quite extensively, and with some bitterness, questions affecting the merits of the Hespeler case, and the regularity of the court's action in sustaining the first motion for a new trial. These questions are, however, all foreign to the merits of this proceeding. The referee's conclusion of law on this branch of the case must therefore be set aside, the findings of facts confirmed, and the

WRIT DENIED.

J. A. LUNDGREN V. JAMES CRUM.

FILED FEBRUARY 18, 1896. No. 6191.

1. **Courts: TRANSFER OF CASES: JURISDICTION.** An action of trespass was begun in the county court. After issues joined there a stipulation was entered into transferring the case to the district court. The pleadings were then refiled in the district court and a trial was there had. It turned out that the vital issue concerned the title and boundaries of land. *Held*, That the stipulation was equivalent to one dismissing the case in the county court and recommencing it in the district court, with appearance of parties, and that the district court had jurisdiction, although the county court might not.
2. **Trespass: PLEADING.** A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, although it prays treble damages and does not charge that the trespass was willful, as required by Code, section 636, as a basis for treble damages.
3. **Review: CONFLICTING EVIDENCE.** Where the evidence is conflicting this court will not disturb the verdict as unsupported by the evidence.

ERROR from the district court of Antelope county. Tried below before BARTOW, J.

R. R. Dickson and C. F. Bayha, for plaintiff in error.

N. D. Jackson and W. H. Holmes, contra.

IRVINE, C.

Crum was the owner of that part of the northwest quarter of section 10, township 25, range 7 west, in Antelope county, lying north of the Elkhorn river, as the course of that river lay in 1883, and Lundgren was the owner of that portion of the quarter section lying south of the river.

Lundgren v. Crum.

Lundgren brought an action in the county court charging that Crum had unlawfully entered upon his land and cut and removed timber to the value of \$90. Crum filed an answer, which was in effect a denial of any entry upon or cutting of timber from the lands of Lundgren. Thereupon a stipulation was entered into that the cause should be transferred to the district court and there stand for trial as though originally commenced in that court, waiving all questions of jurisdiction, and agreeing that the costs should follow the result of the suit. A transcript was filed in the district court, and thereafter the original pleadings were refiled, which was followed by an amended petition filed by Lundgren. There was a verdict and judgment for the plaintiff for \$3, and the defendant prosecutes error.

The issue between the parties was the boundary between their lands, the timber having been cut on a tract which each claimed; the plaintiff claiming that at the time of his grant this tract lay south of the Elkhorn river, but by avulsion in 1888 the stream formed a new channel, whereby the land in dispute was cast to its north. This was the issue tried.

It is first insisted by the plaintiff in error that the action having been begun in the county court, and that court being without jurisdiction in matters wherein the title or boundaries of land may be in dispute (Compiled Statutes, ch. 20, sec. 2), the district court acquired no jurisdiction of the subject-matter. This contention is based on the doctrine that where the court in which an action originates is without jurisdiction of the subject-matter, an appellate court acquires no jurisdiction on appeal, although it might have had juris-

diction of an original action for the same purpose; but this contention ignores the fact that this case did not go to the district court by appeal or otherwise by course of law. It went there before trial in the county court by stipulation of the parties. The stipulation had the same effect as if it had been for the dismissal of the case in the county court and its recommencement in the district court, with the entry of appearance by the defendant. The parties filed their pleadings in the district court and proceeded to trial. The district court had jurisdiction of such actions, and as it was prosecuted there as an original action, and not for the purpose of reviewing any judgment or order of the county court, the original want of jurisdiction in the county court was immaterial.

It is next argued that the amended petition does not state a cause of action. This petition alleges that the plaintiff was the owner of the land described, and in possession thereof; that the defendant, in the summer of 1888, and at various times thereafter, wrongfully, and without consent of the plaintiff, entered upon said premises and cut and removed timber therefrom to the value of \$30, whereby the defendant became liable to pay the plaintiff the sum of \$90; and the prayer is for judgment for \$90. The objection urged to the petition is that it fails to state a cause of action under section 636 of the Code of Civil Procedure, whereby for willful trespass, etc., the trespasser is rendered liable for treble damages. It is stated that the petition is defective in not charging that the trespass was willful. No exceptions were taken to the instructions submitting the case to the jury under this statute,

and the objection that the petition does not state a cause of action does not reach the point. The petition certainly states a cause of action for trespass, independent of the statute, and the prayer for treble damages does not vitiate it.

Finally, it is contended that the verdict is not sustained by the evidence; but the very candid brief of the plaintiff in error discloses that on the controverted issue the evidence was conflicting. As has been repeatedly held, it is not the province of this court in the exercise of its appellate jurisdiction to weigh conflicting testimony.

JUDGMENT AFFIRMED.

PETER C. BOASEN V. STATE OF NEBRASKA.

FILED FEBRUARY 18, 1896. No. 8236.

1. **Mandamus: PAYMENT OF JUDGMENT.** A writ of *mandamus* to compel county officers to pay judgments against the county is not void because the judgments were void.
2. ———: ———: **CONTEMPT.** In such case the nullity of the judgments was a defense to the application for a *mandamus*. The district court having jurisdiction of the parties, had jurisdiction to determine the validity of the judgments, and a writ of *mandamus* issued in that case cannot be resisted because the issue was erroneously determined.

ERROR to the district court for Kearney county.
Tried below before BEALL, J.

Ed L. Adams, for plaintiff in error.

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *Stewart & Hague*, *contra*.

47	245
53	770

IRVINE, C.

Certain judgments were entered against Kearney county in the district court of that county. The judgment creditors applied to the district court for a writ of *mandamus* to require the clerk and the chairman of the board of supervisors to issue warrants in payment of the judgments, it being alleged that there were funds available sufficient for their payment. A peremptory writ was allowed. Thereafter the plaintiff in error succeeded to the office of chairman of the board of supervisors and the writ was served upon him. He refused to comply therewith, and the present proceeding was instituted for contempt in refusing such obedience. He was found guilty and sentenced to be confined in jail until he complied with the requirements of the writ. Error is prosecuted by him from that sentence.

No question is raised as to the writ's binding the plaintiff in error, if it is a valid writ, but the sole question raised is as to the jurisdiction to allow the writ at all; and the objection urged against the jurisdiction of the court is that the judgments which the *mandamus* was issued to enforce were void for want of jurisdiction of the court to render them. The fact, however, if it be a fact, that such judgments were void did not defeat the jurisdiction of the court in the *mandamus* case. The district court has jurisdiction to issue writs of *mandamus* to compel county officers to perform duties enjoined upon them by law. It had jurisdiction of the parties in this case. If the judgments were valid, under the other facts disclosed by the record, it was the duty of the officers to issue the warrants. If they were not valid

for want of jurisdiction of the court rendering them, that would have been a defense in the *mandamus* case, and it actually was pleaded as a defense. The judgment of the district court in favor of the relators in that proceeding adjudicated the validity of the judgments. In the *mandamus* case the district court had jurisdiction to determine whether or not the judgments were void. Jurisdiction is the power to determine, and not merely the power to determine rightly; and the judgment in the *mandamus* case cannot be defeated because the court in that case erroneously determined a question properly presented to it there for determination. The remedy was by appellate procedure, but the proceedings were not void, and the *mandamus* was conclusive until reversed. (*State v. County Judge*, 13 Ia., 139.)

JUDGMENT AFFIRMED.

GEORGE BURKE ET AL. V. UTAH NATIONAL BANK
OF OGDEN.

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FILED FEBRUARY 18, 1896. No. 5933.

1. **Estoppel in Pais.** To constitute an estoppel *in pais* the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give.
2. ———: **COMMISSION MERCHANTS: DRAFTS: ACCEPTANCE.**
B. & F., live stock commission merchants at South Omaha, wrote to the U. Bank a letter saying: "We will pay H. & M.'s drafts until further notice for the cost or value of stock shipped to us here with or without bill of

Burke v. Utah Nat. Bank.

lading attached." *Held*, That B. & F. thereby obligated themselves to accept drafts made in pursuance of such letter of credit, provided they were in fact for the cost or value of stock then shipped; the bank in discounting drafts taking the risk of that fact, but the risk being transferred to B. & F. upon their acceptance of the drafts.

3. ———: ———: ———: ———. Under the letter of credit above quoted, a draft was drawn October 23, and accepted October 29. On October 29 a large shipment of stock was made. November 8 another draft was drawn not covered by stock shipped, unless the shipment of October 29 should be applied thereto. There was no evidence that the bank in receiving the last draft relied on the acceptance of the former as not including the shipment of October 29. *Held*, That under the circumstances B. & F., in defense of an action based on their refusal to accept the last draft, were not estopped from showing that the earlier draft had been covered in part by the shipment of October 29, the day of its acceptance.
4. ———: ———: ———: ———: INSTRUCTIONS. An instruction under such circumstances, to the effect that the bank had a right to rely from the acceptance of the earlier draft upon the fact that stock to cover it had been shipped prior to the date of its acceptance, and that B. & F. could not apply the shipment made on that day to its payment, was erroneous.
5. ———: ———: ———: ———. The estoppel contended for would not arise beyond forbidding B. & F. to apply to the payment of the earlier draft shipments of stock of which they could not reasonably have known at the time of accepting such draft.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Hall & McCulloch and Schomp & Corson, for plaintiffs in error.

Isaac E. Congdon and Joseph R. Clarkson, contra.

IRVINE, C.

In 1888 one Hall and one Moore, partners under the name of Hall & Moore, and engaged, or intend-

ing to engage, in the business of purchasing live stock in the then territory of Utah, and shipping the same to market, opened negotiations with the Utah National Bank with a view to transacting business with that institution. At Hall & Moore's request a letter was written to the South Omaha National Bank inquiring as to the standing of George Burke & Frazier, a firm engaged in the live stock commission business at South Omaha, with which Hall & Moore contemplated transacting their business. This letter was referred by the South Omaha National Bank to George Burke & Frazier, and in response thereto a letter dated August 4, 1888, was addressed to the Utah National Bank by George Burke & Frazier. The letter began as follows: "The cashier of the South Omaha National Bank referred your letter to us to-day, in regard to paying Messrs. Hall & Moore's drafts. In reply would say we will pay Messrs. Hall & Moore's drafts till further notice for the cost or value of stock shipped to us here with or without bill of lading attached." The remainder of the letter is not material to the decision of the case. This letter was received by the Utah National Bank August 8, and on that day its cashier addressed to George Burke & Frazier the following: "Your favor 4th inst. has been received. We will advance Messrs. Hall & Moore such moneys as they may want to draw for on you, which is from what I can from Mr. Hall, for the cost of the cattle here. I will cheerfully reply to any who may ask regards to your standing, etc. I have been in cattle myself and will as far as I can look and see what kind and how many cattle Mr. Hall will ship next week." On that day the Utah bank discounted a draft of Hall & Moore on

George Burke & Frazier for \$1,330, dated August 7; and from that time until October 23 continued to receive from Hall & Moore drafts in various amounts on George Burke & Frazier, all of which were paid. In this way something over \$50,000 was drawn and paid. On October 23 a draft was drawn for \$9,000, which was accepted October 29 and paid November 1. November 8 a draft was drawn for \$16,000, which was in due course presented and acceptance refused. There was thereafter paid thereon about \$7,000, and this action was brought by the Utah bank against George Burke & Frazier to recover the remainder, of about \$9,000. There was a verdict and judgment for the plaintiff for \$7,746.66, and the defendants prosecute error.

The assignments of error are quite numerous. We are practically precluded from an examination of those relating to instructions given by the court of its own motion, because in the motion for a new trial the assignment relating thereto is directed against all the instructions given *en masse*. Many of them are manifestly free from error, and the others cannot therefore be considered. A similar obstacle presents itself to assignments of error relating to the refusal of instructions requested by the defendants. Complaint is, however, made of the giving of the twelfth and fourteenth instructions requested by the plaintiff, and as in our opinion they were both erroneous, the assignment of the two together in the motion for a new trial was sufficient. As the judgment must be reversed because of error in these instructions, we will not consider the other assignments, which relate to rulings upon the evidence, as the questions thereby presented may not recur.

In addition to the facts already stated, it appeared that from October 29 to November 8 there had been drawn checks by Hall & Moore upon the Utah bank which resulted in an overdraft on November 8 to the amount of \$15,549.94. The \$16,000 draft was then drawn, but its amount not placed to the credit of Hall & Moore, although after November 8 several other small checks were paid. The evidence was very meager, but possibly sufficient to show that after the drawing of the \$9,000 draft on October 23 there was shipped by Hall & Moore to the defendants live stock to the value of \$16,000 and upwards; but in order to reach this result we must include in these shipments a large shipment made October 29, the day the \$9,000 draft was accepted. The plaintiff proceeded upon the theory that the acceptance of a draft by the defendants estopped them from asserting that there had not at that time been shipped live stock to meet it; and in accordance with that theory the instructions complained of were given as follows:

"12. You are instructed that when defendants had accepted and paid the \$9,000 draft drawn on October 23, 1888, that plaintiff had the right to presume and rely upon the fact that stock had been shipped prior to the date of such acceptance and payment sufficient to cover the draft, and were warranted in making the advances to Hall & Moore for the purchase of stock to be shipped thereafter to the defendants, and defendants, as against the plaintiff, had no right to apply the proceeds of such future shipments to the payment of said \$9,000 draft."

"14. If you find from the evidence that stock to the cost or value of the \$16,000 draft was shipped

on and after the date of the acceptance of the \$9,000 draft by the defendants, then you are instructed that it is immaterial what the condition of the defendants' account was with Hall."

Now we construe the contract, so far as is material to these instructions, as follows: By the letter of credit of August 4 the defendants obligated themselves to the plaintiff to accept drafts of Hall & Moore for the cost or value of stock shipped to South Omaha by Hall & Moore. The phrase "with or without bill of lading attached" extended their obligation this far: that no duty was imposed upon the plaintiff to insist that bills of lading should be attached to the drafts, and that, therefore, if a draft should be drawn without bill of lading, the defendants were bound to accept it, provided it was for the cost or value of stock then shipped to the defendants; that is, that in accepting a draft the defendants assumed the risk of their receiving the stock to cover it. It was a condition of the letter that drafts should only be accepted to cover the cost or value of the stock shipped; and the bank in discounting drafts took the risk of their being within the terms of the letter of credit. We think, therefore, there was a substantial ground for the general application of a doctrine of estoppel based on the acceptance of the drafts; but we do not think that the instructions given stated the true rule. We realize the force of what was said in *Campbell v. Nesbitt*, 7 Neb., 300, that in regard to estoppels *in pais* "there can be no fixed and settled rules of general application to regulate them, as in technical estoppels; that in many, and probably most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circum-

stances of each case." Still there are some general rules applicable to the doctrine of equitable estoppel. Under the circumstances of this case we would not go so far as to hold, as many courts have done, and probably correctly under the facts before them, that there must be some misrepresentation or concealment of facts known to one party and not known to the other. On the contrary, we think the following statement by the supreme court of Dakota (*Parliman v. Young*, 2 Dak., 175) is correct and applicable to such transactions as the present: "To establish an estoppel *in pais* it must be shown: first, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposed to set up; second, that the other party has acted upon or has been influenced by such act; third, that the party will be prejudiced by allowing the truth of the admission to be proved." But it is also true, as said in that case, that "Estoppels must be certain to every intent; for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former acts." We take it that to constitute an estoppel *in pais* the conduct of the party estopped must have been such as to warrant the other party in acting on the belief that the facts were as indicated by such conduct,—that he must so have believed and acted. Now the fourteenth instruction was to the effect that if stock to the cost or value of \$16,000 was shipped on and after the date of the acceptance of the \$9,000 draft, then the condition of defendants' account with Hall & Moore was

immaterial. In view of the evidence this meant and could only mean that the acceptance of the \$9,000 draft estopped the defendants from asserting that stock to its full amount had not been shipped before the day it was accepted. As we have said, a large shipment of stock was made the very day of its acceptance, and the plaintiff could only recover under the terms of the letter of credit and the evidence by calculating the value of the shipment of October 29 as a portion of the sum for which the \$16,000 draft was drawn. This the instruction in effect required should be done, although the fact might be otherwise. It was not necessary for the plaintiff to go back to the beginning of the transaction and prove that the aggregate cost or value of the stock shipped was equal to the aggregate of the drafts made. Where a draft was accepted the plaintiff had a right to presume that the defendants found that it had been drawn in accordance with the letter of credit, and that stock to the cost or value of its amount had then been shipped; but the plaintiff had no right to presume that acceptances were given based solely on shipments made prior to the day of the acceptance. In accepting a draft the defendants did not give the plaintiff to understand anything more than that stock in value equal to the amount of the draft had at the time of the acceptance been shipped. These are days of the electric telegraph, and on the presentation of a draft for \$9,000 on October 29 the defendants might accept it on the faith of information in their possession that stock had that very day been shipped to cover it. We do not say that there is evidence to support this view; but we are not dealing with the actual facts; we are

merely considering what the defendants' conduct gave the plaintiff a right to rely on. The shipment of October 29 might have been, so far as the evidence discloses, before the \$9,000 draft was accepted. The plaintiff was bound to know that this might be so. It had no right in making future advances to presume that it was not so; and more than that, the evidence fails to show that in making such advances the plaintiff relied on the acceptance of the \$9,000 draft, as showing that the shipment of October 29 was not yet drawn against. The estoppel contended for, therefore, could not arise beyond forbidding the defendants to apply to the payment of earlier drafts shipments of stock of which they could not reasonably have known at the time of the acceptance of such drafts, and the instruction was erroneous in that it held the defendants estopped from proving the application to the payment of the \$9,000 draft the shipment of stock made the day of its acceptance. The twelfth instruction is similar in its effect to the fourteenth, except that its language leaves it uncertain whether the acceptance or the payment of the \$9,000 draft created the estoppel. Now the obligations of the defendants were fixed by acceptance, and payment after acceptance and in pursuance of that obligation—at least where the paper was, or was supposed to be, in the hands of a holder for value—created no new estoppel. Aside from the injection of this element, and the uncertainty created thereby, the instruction is open to the same objections as the fourteenth.

REVERSED AND REMANDED.

THOMAS MURRAY V. ANTON LOUSHMAN.

FILED MARCH 3, 1896. No. 6150.

1. **Pleading: AMENDMENTS.** Notwithstanding the liberal provision for amendment of pleadings, the subject is one resting largely in the discretion of the trial court, and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court.
2. **Chattel Mortgages: TITLE TO CHATTELS.** The title of property pledged by chattel mortgage remains in the mortgagor until divested by means of foreclosure proceedings. (*Musser v. King*, 40 Neb., 892.)
3. ———: **FORECLOSURE: DELAY.** One who takes possession of mortgaged chattels in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law, does so with the implied obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor.
4. ———: **USE OF CHATTELS: DAMAGES.** The mortgagee's right to the use of chattels mortgaged is, in the absence of a special agreement, merely such as is incident to the foreclosure proceeding, and the breach of his obligation in that regard is an actionable wrong.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Slabaugh & Rush, for plaintiff in error.

G. A. Rutherford, contra.

POST, C. J.

This was an action by the defendant in error, plaintiff below, who sued to recover for the use of a span of mules for the period of seven months. The answer admits the allegations of the petition, except as to the value of the use of the mules de-

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scribed, and charges in justification thereof the following facts: (1) A chattel mortgage on the mules in controversy for \$180, long past due; (2) that the defendant took possession of said mules for the purpose of foreclosing his mortgage September 12, 1889, and kept them at his own expense with the plaintiff's consent until May 16, 1890, when they were sold at public auction for the sum of \$101. Accompanying the answer is an allegation of indebtedness by the plaintiff for rent due the defendant in the sum of \$11.32, and for which judgment is asked by the latter. The reply is a general denial. A trial was had in the district court, resulting in a verdict for the plaintiff therein in the sum of \$126.43. Subsequently, having remitted \$95 of the amount so found, in accordance with the order of the court, judgment was entered in his favor in the sum of \$30.93, and which has been removed into this court by the petition in error of the defendant below.

The first assignment of error relates to the ruling of the district court during the trial in denying the defendant's request for leave to so amend his answer as to set off against the plaintiff's cause of action the balance secured by the mortgage mentioned. The proposed amendment was not to conform the pleadings to the facts proved, but for the purpose of inserting a new and distinct cause of action in favor of the defendant. Although liberal provision is made for the amendment of pleadings (Civil Code, sec. 144), the subject is one resting largely in the discretion of the trial court, and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court. (*Mills v. Miller*, 3 Neb., 87; *Hedges v. Roach*, 16 Neb., 673; *Johnson v. Swayze*,

35 Neb., 117; *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb., 750.) We are unable to say that the ruling complained of involves any abuse of discretion. The defendant was fully advised of his rights at the commencement of the action more than a year and a half previous, and had ample opportunity to interpose whatever claims were available in his favor against the plaintiff; and having failed to assert the mortgage debt until the plaintiff had rested his case, he will not now be heard to complain of the action of the court in denying his request to amend.

It is argued that the plaintiff had no right to the use of the mortgaged property after condition broken, his remedy being by an action for redemption or to recover the surplus, if any, remaining after the satisfaction of the defendant's mortgage. That argument is based upon the proposition, once recognized as the law of this state, that the effect of a chattel mortgage is to transfer to the mortgagee the legal title of the property conveyed, subject to be defeated only by performance of the stipulated conditions. But in *Musser v. King*, 40 Neb., 892, it was held, overruling *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, that the mortgagee has a lien only upon property pledged by chattel mortgage, and that the title thereto remains in the mortgagor until divested by means of foreclosure proceedings. (See, also, *Bedford v. Van Coit*, 42 Neb., 229.) The right of the mortgagee under a chattel mortgage to possession of the property conveyed pending foreclosure proceedings will not be controverted; but when he takes possession of property in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law, he does so with the implied

obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor. The mortgagee's right to the use of chattels conveyed is, in the absence of a special agreement, such only as is incident to the foreclosure of the mortgage, and a breach of his obligation in that regard is an actionable wrong.

The judgment in this case is vigorously assailed on the ground that it is clearly unsupported by the evidence. We shall not, however, attempt a synopsis of the testimony. It is conceded that, so far as the number of witnesses is concerned, the advantage is decidedly in favor of the defendant; but, as has been repeatedly held, the credibility of the witnesses is a question for the jury, and a verdict based upon conflicting evidence will not be set aside on account of any mere difference of opinion between this court and the trial judge or jury. The evidence introduced by the plaintiff below tended to prove that the mules in question were used by the defendant without the consent of the former, from the time they were taken under the mortgage in September, 1889, until the date of their sale in May, 1890, and which was worth from 75 cents to \$1 per day. Assuming the defendant's claim for rent to have been established to the satisfaction of the jury, the amount of the recovery allowed on the plaintiff's cause of action, \$102.25, is certainly not so unreasonable as to call for interference by this court.

Exception was also taken to the refusal of the following instruction: "You are instructed that the defendant, under the testimony, has a just and valid claim against the plaintiff for the amount due on the two notes set out in the answer, together with interest thereon." The in-

struction was rightly refused. Although the notes therein mentioned represent the debt secured by the mortgage, they are not alleged as a cause of action against the defendant. Had the action been for the wrongful conversion of the mules, it is possible that the amount due on the mortgage would, even under a general denial, have been a proper subject of inquiry, as bearing directly upon the question of the plaintiff's interest in the property converted; but that rule can have no application to the case made by the pleadings, in which the only ground of recovery is the implied obligation of the defendant below to reasonably compensate the plaintiff for the use of his mules.

There is no error in the record, and the judgment is

AFFIRMED.

GEORGE B. TZSCHUCK ET AL. V. WILLIAM D. MEAD, JR.

FILED MARCH 3, 1896. No. 6273.

Res Judicata: DEFICIENCY JUDGMENTS: COURTS: JURISDICTION.
Order of the circuit court of the United States for the district of Nebraska, denying a deficiency judgment in a foreclosure proceeding upon the cause of action herein alleged, *held* to involve the merits of the cause, and not the question of jurisdiction only.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Edward W. Simeral, for plaintiffs in error.

References: *Gould v. Evansville & C. R. Co.*, 91 U. S., 526; *Burner v. Herener*, 26 Am. St. Rep. [W.

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Tzschuck v. Mead.

Va.], 948; *Ober v. Gallagher*, 3 Otto [U. S.], 199; *Ward v. Todd*, 103 U. S., 327; *Haines v. Finn*, 26 Neb., 380; *Mason v. Hartford P. & F. R. Co.*, 19 Fed. Rep., 55; *Parker v. Ormsby*, 141 U. S., 81; *Morris v. Gilmer*, 129 U. S., 315; *Des Moines Navigation & Railroad Co. v. Iowa Homestead Co.*, 123 U. S., 552; *Skillern v. May*, 6 Cranch [U. S.], 267; *McCormick v. Sullivant*, 10 Wheat. [U. S.], 192; *Holmes v. Oregon & C. R. Co.*, 9 Fed. Rep., 236; *Settlemier v. Sullivan*, 97 U. S., 444; *Erwin v. Lowry*, 7 How. [U. S.], 172; *Ex parte Watkins*, 3 Pet. [U. S.], 206; *Kennedy v. Georgia State Bank*, 8 How. [U. S.], 610; *Noonan v. Bradley*, 12 Wall. [U. S.], 129; *Whyte v. Gibbes*, 20 How. [U. S.], 541; *Daniels v. Tibbets*, 16 Neb., 666.

William A. Redick, contra.

References: *Mersneau v. Werges*, 3 Fed. Rep., 378; *Vannerson v. Leverett*, 31 Fed. Rep., 366; *Schribar v. Platt*, 19 Neb., 630; *Blacklock v. Small*, 127 U. S., 96; *Cameron v. McRoberts*, 3 Wheat. [U. S.], 591; *Bank of United States v. Moss*, 6 How. [U. S.], 31; *United States v. Huckabee*, 16 Wall. [U. S.], 414; *Morgan v. Plumb*, 9 Wend. [N. Y.], 287; *Bottorff v. Wise*, 53 Ind., 34; *Miles v. Caldwell*, 2 Wall. [U. S.], 35; *Sturtevant v. Randall*, 53 Me., 154; *Perkins v. Parker*, 10 Allen [Mass.], 22; *Hungerford's Appeal*, 41 Conn., 322; *Jackson v. Schoonmaker*, 2 Johns. [N. Y.], 229; *Clapp v. Maxwell*, 13 Neb., 542; *Taylor v. Larkin*, 12 Mo., 104; *Waddle v. Ishe*, 12 Ala., 308; *Hughes v. United States*, 4 Wall. [U. S.], 236; *Colby v. Parker*, 34 Neb., 510; *Stover v. Tompkins*, 34 Neb., 465.

Post, C. J.

On the 18th day of June, 1888, George W. Paul, a citizen of this state, executed to David Jamieson,

also a citizen of this state, a mortgage upon certain real estate in Douglas county to secure the three notes of the mortgagor bearing date of October 15, 1887, amounting in the aggregate to \$2,570. Paul on the 11th day of September, 1888, sold and conveyed the mortgaged property to the plaintiff in error Tzschuck by deed containing the following recital immediately following the *habendum* clause: "Subject to a mortgage of \$2,570 given to David Jamieson under date of June, 1888, and which mortgage the said George B. Tzschuck hereby assumes as a part of the purchase money for said lots and agrees to pay the same when due." Subsequently the defendant in error, William D. Mead, Jr., a citizen of the state of New York, filed in the circuit court of the United States for the district of Nebraska a bill in equity wherein he prayed for the foreclosure of said mortgage and for a deficiency judgment against Paul and Tzschuck. It was in said bill alleged that the complainant therein acquired said notes and mortgage by assignment from Jamieson, but without disclosing the citizenship of the latter, who was then, and had been since the execution of said notes, a citizen and resident of this state. Process was issued for and served upon the defendants named in accordance with the rules and practice of that court, and who in due time filed separate answers, as to which reference will be hereafter made, but in no way challenging the jurisdiction of the court over the persons of the defendants or the cause of action alleged. On July 8, 1889, a decree was entered in accordance with the prayer of said bill, accompanied by a finding that Tzschuck had assumed the payment of the mortgage therein mentioned, and was per-

sonally liable for any deficiency remaining after applying in satisfaction thereof the proceeds of mortgaged property, and which decree was on his, Tzschuck's, written request stayed for the period of nine months. The stay having expired, the mortgaged premises were, on the 4th day of October, 1890, by a special master, sold to the Mead Investment Company, of which report was in due time made to the court. Subsequently, on the 20th day of October, the complainant therein, by his solicitor, moved for a confirmation of the sale and for a deficiency judgment against Paul and Tzschuck in the sum of \$2,181.82, the ascertained balance due on the original decree. Tzschuck, by whom alone said motion was resisted, on October 23 entered a special plea to the jurisdiction of the court, and praying for the vacation of the decree of foreclosure on the ground that the complainant was a citizen of New York and that Jamieson, his alleged assignor, was when said proceeding was commenced, and had been since the execution of said notes, a resident and citizen of this state. The sale was, it appears, on November 10 confirmed, and the special master ordered to execute a deed to the purchaser, although the record of said order contains no reference to the motion for a deficiency judgment, or to the defendant's plea to the jurisdiction of the court. Counsel agree, however, that the motion for deficiency judgment was, at a subsequent term, sustained as to Paul, and that the motion, so far as it related to the claim against Tzschuck, was at a still later date overruled. The record of the last mentioned order, which has never been reversed or modified, is as follows: "This cause having been heard on the motion of the complainant for judgment for

deficiency arising under the sale of the mortgaged premises under the decree herein, and the court being fully advised in the premises, doth now on this day, order, adjudge, and decree that said motion be, and the same is hereby, overruled, to which ruling and order the complainant, by his solicitor, then and there duly excepted." The complainant therein, to whom the mortgaged property in the meantime had been conveyed by the purchaser at the master's sale, in the month of June, 1891, filed in the district court for Douglas county his petition in equity, to which both Paul and Tzschuck were made defendants, praying a foreclosure of said mortgage, and alleging that the proceedings of the circuit court, there set out, were void for want of jurisdiction. There was also a further prayer for deficiency judgment against the defendants named in case the decree of foreclosure and the sale thereunder were found to be valid. To that petition the defendant Tzschuck interposed, as a defense, the decree of the circuit court, and particularly the order overruling the complainant's motion therein for a deficiency judgment. The plaintiff, by way of reply, alleged (1) that the order relied upon did not involve the merits of the motion for judgment, but the jurisdiction of the court only; (2) that the answering defendant, by his plea to the jurisdiction of the circuit court, was estopped to assert said order as an adjudication of the merits of the claim therein made. Upon the issues thus joined a decree was in due time rendered quieting the plaintiff's title to the property described as against the several defendants, in which it was found that the motion for deficiency judgment was overruled by the circuit

court on the sole ground that said court did not have jurisdiction of the cause, and the said order was accordingly no bar to that action. But instead of awarding judgment as prayed, an order was entered directing the plaintiff to so amend his petition as to declare at law against the defendant Tzschuck for the amount remaining unpaid of the mortgage debt, and, in conformity with which, pleadings were filed, upon which the cause was subsequently tried to the same judge, who found upon the issues thus joined for the plaintiff, and upon which was entered the judgment presented for review by means of this proceeding. The issues raised by the pleadings are substantially the same as those involved in the proceedings to which they are supplemental and do not require extended notice at this time.

The controversy in this court, notwithstanding the apparently complex character of the transactions shown, involves a single question, to which all others are merely incidental, and important only in so far as they assist in its solution, viz.: Did the circuit court, by the order denying the deficiency judgment, determine the merits of the complainant's claim therein against Tzschuck? The judgment below is defended on the ground, among others, that the finding of the district court in the equity case is conclusive of the present controversy; but that claim is certainly without merit, for the reason, as we have seen, that there was in that proceeding no final decree against Tzschuck. Such a record is no more available as an estoppel than would be the verdict of a jury without a judgment.

Aside from the documentary evidence bearing upon the subject, the solicitor for the complain-

ant therein testified that the only question presented to or determined by the circuit court upon the hearing of the motion was that of its jurisdiction to render a deficiency judgment against Tzschuck; although he in effect admits that there was on that occasion an intimation by the presiding judge that the complainant was entitled to a personal judgment against the party primarily liable for the mortgage debt and no other. The defendant therein testified in his own behalf that the judge in passing upon the motion remarked that the allowing of a personal judgment in a foreclosure proceeding against parties other than the mortgagor was discretionary, and had never been done in that court, in which he is to some extent corroborated by his solicitor. That evidence *aliunde* was admissible for the purpose of proving what issues were in fact tried and determined upon the hearing of the motion, is a proposition not controverted in this proceeding. We assume, therefore, that such evidence was rightly received; and if our judgment depended upon the testimony of the witnesses concerning the basis of the order in question, we could, without difficulty, agree to an affirmance of the judgment. We are, however, convinced that the trial judge either overlooked the evidence supplied by the record of the circuit court, or failed to accord it the consideration to which it is justly entitled.

We understand both parties to concede that the decree of foreclosure is valid and conclusive upon the parties thereto. It is true we find in the brief of defendant in error this language: "The United States court never had jurisdiction of the case of Mead v. Paul et al., because of the citizenship of Jamieson, assignor of the complainant,"—which

we interpret to mean that the circuit court would, had Jamieson's citizenship been disclosed before final decree, have refused to entertain the cause, or in any manner proceed therewith. That view is the correct one, and is sanctioned by numerous decisions of the supreme court of the United States in giving construction to the acts of congress defining the jurisdiction of the federal judiciary. (See *Blacklock v. Small*, 127 U. S., 96; *Parker v. Ormsby*, 141 U. S., 81.) Further reference to the statutes mentioned is deemed unnecessary for the purposes of the present controversy. Nor would a review of the decision upon the subject by the federal courts, in this connection, be of profit to the parties or to the profession. It is sufficient for our purpose that the circuit court, according to the bill of the complainant therein, had jurisdiction of the cause, and the decree rendered thereon cannot be regarded as a nullity. True, it might perhaps have been reversed or vacated on appeal, or even by that court, but its validity cannot be assailed in a strictly collateral proceeding. (See *Erwin v. Lowry*, 7 How. [U. S.], 172; *Des Moines Navigation & Railroad Co. v. Iowa Homestead Co.*, 123 U. S., 552.) It follows, as a necessary deduction from the foregoing proposition, that the circuit court was possessed of jurisdiction to make such orders, and take such steps as were necessary and appropriate for the enforcement of its decree, by sale of the mortgaged property, and by means of judgments and execution against the parties personally liable for the debt thereby secured.

Let us again, in the light of these rules, briefly summarize the essential facts of the case. The circuit court on November 10, 1890, expressly asserted its power to enforce the decree, by overrul-

ing Tzschuck's objection to its jurisdiction, and by confirming the master's sale previously made. It also at a subsequent day further asserted its jurisdiction by awarding personal judgment against Paul for the balance due on the notes executed by him; and later still denied the complainant's motion for judgment against Tzschuck. A reference to the last mentioned order (above set out) discloses no doubt in the mind of the court with respect to its jurisdiction over the subject involved, while on the contrary it clearly appears to include the merits of the motion. Had the decision involved the question of jurisdiction only, the complainant would, we are bound to presume, have insisted upon preserving his rights by a truthful recital of that fact in the record of the court. We are, therefore, in order to reach the conclusion of the district court, required to infer, upon extrinsic and conflicting evidence, not that the ruling of the circuit court is erroneous merely, but an intentional reversal by it of a previous ruling in the same cause, deliberately made and confessedly sound. Such an inference will not be indulged, since it is unreasonable and altogether inconsistent with the presumption which exists in favor of the judgments of courts of general jurisdiction. The judgment will accordingly be reversed and the cause remanded for further proceedings therein.

REVERSED.

EDITHA H. CORBETT ET AL. V. JOHN C. FETZER.

47	289
50	619
53	76
55	463

FILED MARCH 3, 1896. No. 6164.

1. **Parol Evidence: NEGOTIABLE INSTRUMENTS: INDORSEMENTS.**

The words "without recóurse," following the name of the first, and preceding the name of the second indorser of a bill or note, may be shown by parol evidence to apply to the former instead of the latter.

2. **Negotiable Instruments: INDORSEMENTS: EVIDENCE.** AS against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but, as between the original parties to such an indorsement, the terms of the contract is a proper subject of inquiry, and may be established by parol evidence. (*Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326.)3. ———: ———: ———. Plaintiffs in error, on the evidence in the record, *held* not liable as indorsers.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

B. G. Burbank, for plaintiffs in error.

J. J. O'Connor, *contra*.

Post, C. J.

This was a proceeding by Fetzer, the defendant in error, in the district court for Douglas county to foreclose fifty-seven different mortgages executed by William B. Cowles and wife to Editha H. Corbett, upon certain property in North Side Addition to the city of Omaha, to secure payment of as many notes of even date therewith, payable by said Cowles to the order of the mortgagee named. It is alleged in the petition that the said Editha H. Corbett, Charles Corbett, Day & Cowles, and

R. W. Day, who were made defendants, indorsed said notes and thus became liable thereon. The prayer is for a foreclosure of the mortgages and for personal judgment against Day & Cowles, R. W. Day, and the Corbetts for any balance remaining due on their said indebtedness, after applying thereon the proceeds of the mortgaged property. Of the defendants named the Corbetts (husband and wife) only answered, admitting the allegations of the petition, except as to their personal liability, and charging that the notes above described were indorsed without recourse upon them. The reply is a general denial. The district court, upon the issues joined, found generally for the plaintiff, accompanied by a special finding that the Corbetts were liable as indorsers of said notes, and a decree was entered in accordance therewith, which has been removed into this court for review.

Practically the only question presented by the motion for a new trial and the petition in error relates to the liability of the Corbetts as indorsers of the notes above described. On the back and near the top of each of said notes appears the following: "E. H. Corbett. Chas. Corbett. Without recourse on us. Day & Cowles. R. W. Day." Said notes, according to the claim of the Corbetts, had been pledged to Samuel R. Johnson, bearing their indorsement in blank, as collateral security, and shortly before the consummation of the sale thereof to Fetzer the words immediately following their names, as shown above, were added in order to limit their liability thereon. The transaction which resulted in the purchase of the notes by Fetzer was conducted on the part of the Corbetts by R. W. Day, one of the defendants named,

who testified that the indorsements "Day & Cowles" and "R. W. Day" were made during such negotiations at the request of the plaintiff, and that previous to such indorsement the words "without recourse on us" were written thereon in his presence by C. W. Johnson, a clerk in the office of Mr. Corbett, and in which he is corroborated by both Johnson and Corbett. There are observable from the record facts which tend strongly to sustain the contention that the words of limitation were intended to apply to the indorsement of the Corbetts rather than to that of Day & Cowles or R. W. Day. They were in the first place written with different ink, apparently at a different time, and certainly in a different hand from that employed in the subsequent indorsements. They were also written by Corbett's clerk, by his order and direction, pending the negotiations for the sale of the notes and at a time when the question of their liability upon paper of like character would naturally be uppermost in the minds of solvent indorsers, as the Corbetts are shown to have been. Johnson was asked on cross-examination why the words "without recourse" were not written over the names of the indorsers, to which he answered, in substance, that Mrs. Corbett's name was written so near the upper margin of the note as to leave no room therefor,—an explanation which is shown by the record to be entirely consistent with the facts. Again, the claim that the subsequent parties, instead of the Corbetts, indorsed without qualification finds support in the fact that both R. W. Day and the firm of Day & Cowles were beneficially interested in the sale of the notes, and the further fact that their absolute liability thereon is established by the per-

sonal judgment entered against them in this case by default, as also by the admission under oath of Day, who testified in behalf of the defendants. On the part of the plaintiff below, Fetzner, it is shown that when the notes were first exhibited to him by Day, four or five days previous to the close of the transaction, they bore no indorsements aside from the names of the Corbetts, and that when next seen by him they were indorsed as now, except the name of Mr. Day, which was added in his, Fetzner's, presence at the time they were delivered to him. He testified also that he purchased the notes described, relying upon the indorsements of the Corbetts, paying therefor seventy-eight per cent of their face value, and that at the same time he purchased other notes executed by Cowles and indorsed by the Corbetts without recourse, at fifty-four per cent of the amount due thereon. He is also corroborated to some extent by his brother, William Fetzner, and Mr. Martin, who were present during the several interviews with Day. A final analysis of the evidence shows the following facts, as to which there is no substantial controversy: (1.) When the notes were first offered for sale to Fetzner they bore the blank indorsement of the Corbetts. (2.) Afterward, pending negotiations for the sale thereof, Charles Corbett, for the purpose of limiting the liability of himself and wife as indorsers of said notes, caused to be written thereon immediately below their names the words "without recourse on us." (3.) The names of the said Editha H. Corbett and Chas. Corbett were written so near the margin of said notes and each of them as to leave no room for the words quoted above their names. (4.) R. W. Day, one of the subsequent indorsers,

has expressly admitted his liability on said notes, and the absolute liability of the firm of Day & Cowles thereon is established by the decree in this case entered by default. (5.) That said notes, when finally purchased by Fetzer, bore all the indorsements now appearing thereon, except the name of R. W. Day, and were at said time indorsed by said Day at his, Fetzer's, request. (6.) Fetzer purchased said notes, paying therefor seventy-eight per cent of their face value, relying upon the indorsement of the Corbetts, who were then solvent.

The remaining questions merely involve the application of the law to the facts above stated. A case in point is *President of Fitchburg Bank v. Greenwood*, 84 Mass., 434. Upon the back of the note produced at the trial of that case there appeared in three successive lines the following indorsements: "Greenwood & Nichols—without recourse—Asa Perley, 2d." Parol evidence was offered by Greenwood & Nichols tending to prove that the words "without recourse" were written by them for the purpose of limiting their liability as indorsers and rejected in the absence of an offer to prove notice by the plaintiff, a remote indorsee and alleged *bona fide* holder. In reversing the judgment of the lower court Bigelow, C. J., said: "There is no rule of law which requires a party to limit or qualify his indorsement by any writing preceding his signature. Such qualification may and often does follow the name of the party. Text-writers of approved authority recognize this mode of limiting the liability of an indorser as regular and appropriate." The doctrine of that case is sustained by the following authorities therein cited: Chitty, Bills (10th Am. ed.),

234, 235; Story, Promissory Notes, sec. 138 and note; and in 2 Randolph, Commercial Paper, sec. 720, we observe it is approved in the following emphatic language: "The words 'without recourse,' following the name of an indorser, A, and preceding the name of indorser B, may be shown by A to apply to his indorsement, even against a *bona fide* holder who supposed it to apply to B's." It may be, as intimated, that there existed a purpose, shared by Day and Corbett, to deceive the plaintiff by inducing him to purchase the notes in the belief that the Corbetts were liable thereon. Such a contention has, however, no foundation either in the pleadings or the proofs, which show that he, Fetzer, throughout the entire transaction, relied upon his own judgment respecting the value of the paper in question; nor is there any force in the objection that the evidence explanatory of the indorsement of the notes by the Corbetts tends to change or vary their written obligation. As bearing upon that question we quote further from the opinion above cited: "It [the evidence offered] had no tendency to vary or control the written contract, or to change the legal effect of the indorsement. It only proved what the contract really was, at the time it was entered into by the defendants.

* * * The attempt in this case is not merely to hold the defendants on a contract according to its meaning and legal effect, but to fasten on them a contract into which they never entered. If the plaintiffs mistook the application of the words which were written for the purpose of qualifying the indorsement of the defendants on the note, this fact furnishes no ground for enlarging or changing their liability on the contract

Barsby v. Warren.

into which they in fact entered." It will be remembered, too, that this cause presents no question of fraud or estoppel, nor is the action one between the indorser and a *bona fide* holder of commercial paper, but between the parties to the contract of indorsement, and, therefore, within the rule recognized in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326. It was held in the case last cited that, as against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but that, as between the original parties thereto, the precise terms of such contract is always a subject of inquiry, and that parol evidence is admissible for that purpose. The conclusion we reach is that the provision of the decree of the district court for a deficiency judgment against Corbett and wife is unsupported by the evidence, for which it should be reversed and the cause dismissed as to the plaintiffs in error.

REVERSED.

IRVINE, C., not sitting.

JOHN BARSBY V. N. H. WARREN & COMPANY.

FILED MARCH 3, 1896. No. 6126.

Action Upon a Conditional Promise: JUDGMENT FOR DEFENDANT. Evidence examined, and *held* to sustain the judgment complained of.

ERROR from the district court of Fillmore county. Tried below before MORRIS, J.

John Barsby, pro se.

Sedgwick & Poyer, contra.

POST, C. J.

This was an action by the plaintiff in error in the district court for Fillmore county, who sought to recover upon the following agreement:

“Whereas, a certain agreement was made and entered into the 22d day of July, 1885, by and between the village of Fairmont, Fillmore county, and state of Nebraska, party of the first part, and Ira E. Williams, of said Fairmont, party of the second part, whereby the said village of Fairmont agreed to pay to the said Williams the sum of eight thousand nine hundred and sixteen dollars, upon the completion of a system of water-works described in said agreement, and the acceptance of said works by the said village of Fairmont; and whereas, said agreement has been assigned by the said Ira E. Williams to James Peabody, and the said James Peabody has assigned the same to N. H. Warren & Co.; and whereas, the said Ira E. Williams has agreed to pay John Barsby five hundred dollars out of the money to be paid by the said village of Fairmont under the said contract: Now, we, the undersigned, in consideration of the premises, agree to hold for and pay to the said John Barsby the sum of (\$500) five hundred dollars as soon as we shall receive from the said village of Fairmont the said sum of eight thousand nine hundred and sixteen dollars as provided in said contract.

“Witness our hands, Chicago, March 4, 1886.

“N. H. WARREN & Co.”

The breach alleged is the sale and assignment by the defendants of the contract mentioned in the foregoing written agreement to Palmer, Fuller & Co. and their failure to complete the system of water-works therein referred to, whereby they, defendants, were unable to demand or receive from the village of Fairmont the sum of \$8,916, or any other sum of money. Reference will hereafter be made to the answer, so far as essential to a consideration of the questions presented by the record. At the conclusion of the plaintiff's evidence a verdict was returned for the defendants under the direction of the court, upon which judgment was subsequently entered, and which it is sought to reverse by means of this proceeding.

We find in the record nothing to indicate whether or not the water-works had been completed at the date of the assignment by defendants to Palmer, Fuller & Co. It does, however, appear that the village, for reasons not disclosed, refused to pay the stipulated price of \$8,916, and that an effort was made to compromise the claim for \$7,000, which was defeated, the village board being evenly divided thereon, and the plaintiff, the acting mayor, declining to vote. A compromise was, however, subsequently effected, whereby Palmer, Fuller & Co. received the sum of \$6,500 in village warrants in full satisfaction of their claim under and by virtue of said contract. It is evident from the pleadings that the defendants' liability is not absolute. Their undertaking, on the contrary, was to hold for and pay to the plaintiff the sum of \$500 on the receipt by them of the full sum of \$8,916. It is not at this time necessary to determine whether an action would

lie for a breach of the particular agreement set out, except upon the actual receipt by the defendants of the sum of money therein named. It is sufficient that they would be legally answerable for any act of theirs which would incapacitate them to demand or receive the money due from the village, to the plaintiff's damage. The rights of the plaintiff appear to have been protected in assignment by the defendants to Palmer, Fuller & Co., judging by the following letter:

"CHICAGO, Dec. 11, '90.

"JOHN BARSBY: We sold our interest in the water-works claim to Palmer, Fuller & Co., showing them our contract with you, which they assumed. As by the contract, 'we agree to hold for and pay to the said John Barsby the said sum of \$500 as soon as we shall receive from said village of Fairmont the sum of \$8,916, as provided in said contract.' P. & F., attorneys, when shown the contract and required by us to assume it, said, 'Very well, we will, and hope we shall have it to pay.'

"Yours truly, N. H. WARREN & Co."

Defendants, by their answer, in effect charge that Palmer & Fuller were unable, with their assistance, after making all reasonable and necessary efforts, to collect from the village any sum on said contract in excess of the \$6,500 above mentioned, and that they are not answerable for the loss resulting from such failure to the plaintiff or to Palmer, Fuller & Co. The necessary inference from the plaintiff's evidence is that the \$6,500 finally paid by the village represents the amount actually due from the latter at the time of the assignment of the contract to the defendants, as well as at the date of the assignment by them to Palmer, Fuller & Co. It follows there-

Van Etten v. Coburn.

from that the plaintiff's loss did not result from the defendants' alleged wrongful act, but from antecedent causes for which they, the defendants, are in nowise responsible. It follows that the judgment is right and should be

• AFFIRMED.

EMMA L. VAN ETTEN V. WILLIAM COBURN.

FILED MARCH 3, 1896. No. 6014.

Action Against Sheriff for Fees Wrongfully Received and Retained: JUDGMENT FOR DEFENDANT. Evidence in the case examined, and *held* not to sustain the finding and verdict of the jury in the trial court.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

David Van Etten, for plaintiff in error.

Thomas D. Crane, *contra*.

HARRISON, J.

In this action, commenced in the district court of Douglas county, the plaintiff, also plaintiff in error, asked the recovery from the defendant of the sum of \$11.70, fees received by him as sheriff, he then being such officer in Douglas county. It was claimed by the plaintiff that the amount sued for was illegally received by the officer as fees, and that he was thereby liable for their repayment and also a statutory penalty of \$50. A portion of the petition is as follows, after an allegation that the defendant was sheriff of Douglas

county from about January 1, 1886, to about January 1, 1890: "The plaintiff complains of said defendant for that, on or about the 19th day of June, 1888, he, acting as said sheriff, illegally and wrongfully, without plaintiff's knowledge or consent, took, retained, appropriated, and converted to his own use and benefit \$11.70 of plaintiff's money, under the pretense and claim that he had, on or about the 14th and 15th days of March, 1886, served for said plaintiff and at her instance and request subpoenas upon A. Gsantner, N. Spellman, Wm. Klatt, Jacob Neu, Sullivan Bros. (Dan and John H.), John Libbie, N. J. Sander, James Morton, Charles Kusters, S. D. Crawford, and A. L. Wiggins, upon which he so took, appropriated, retained, and converted to his own use and benefit \$7.20 in fees and mileage, claiming and pretending he had served said subpoenas at the instance and behalf of said plaintiff as defendant in the action entitled George A. Hoagland v. Emma L. Van Etten et al., docketed in the district court of Douglas county, Nebraska, in Appearance Docket X, number 375, and that he had done and performed said services as said official for plaintiff and at her instance and request, when in truth and in fact she had not caused said subpoenas to issue and he had not done and performed any of said services for her or in her behalf, or at her instance or request, and she has not at any time become liable therefor, and said defendant has not at any time become entitled to recover from plaintiff any of said fees which said defendant, as aforesaid, illegally and wrongfully took and retained from her and as said official so appropriated and converted to his own use and benefit; and that said defendant, on the same

day, illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit in the same action and for other pretended services therein for plaintiff, and as such official, other \$4.50 of plaintiff's money, without her knowledge or consent, when in truth and in fact said defendant, as said official or otherwise, had not done or performed any services in said action or otherwise, or upon which he was or might be entitled to recover from plaintiff, for which he had not been paid in full at or before the doing and performing of any such services, and whereby said defendant, illegally and wrongfully, took, retained, appropriated, and converted to his own use and benefit said \$11.70 greater fees than the fees limited and expressed by law to said official for any and all services done and performed by him for plaintiff in said action or otherwise, and so illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit said \$11.70 of plaintiff's money as fees for such official, where the business chargeable for such fees was not actually done and performed for said plaintiff or in her behalf, or wherein she was liable or might become liable, and which said \$11.70 said plaintiff has demanded of said defendant, and he has neglected and refused to pay the same, or any portion thereof. Whereby said defendant has become indebted to said plaintiff in said sum of \$11.70, and interest from June 19, 1888, and she has become entitled, under and by virtue of said facts, to recover from defendant, in addition to said \$11.70 and interest, the sum of \$50 debt, and an action has accrued against said defendant in favor of said plaintiff for the sum of \$61.70 and interest on \$11.70 thereof from June

19, 1888." The answer of the defendant admitted that he was the sheriff of Douglas county at the time stated in the petition and denied each and every other allegation thereof. There was a trial and a verdict and judgment in favor of defendant, and the plaintiff brings the case to this court for review by proceedings in error.

The evidence in this case discloses that there was an action commenced in the district court of Douglas county, by George A. Hoagland, against Emma L. Van Etten et al., in which the sheriff served several subpoenas, one or two ordered by the defendant Emma L. Van Etten and the others by the plaintiff Hoagland. On June 19, 1888, Hoagland's attorney paid into court \$89.15. Why, or on what account, does not appear, further than is shown in an entry in the appearance docket of the district court, wherein it was stated, "Received of plaintiff, by Mr. Switzler, his attorney, \$89.15, account of costs paid by defendant Van Etten." The \$11.70, for which this suit was instituted, was, so far as is shown by the testimony introduced during the trial in the district court, composed of fees charged and received by the sheriff for serving subpoenas in the case of Hoagland v. Emma L. Van Etten et al. Two of these subpoenas were issued, the evidence shows, for witnesses on the part of the defendant in the action, and the amount of fees charged for their service was \$4.50, \$3.90 for one and 60 cents for the other. This sum the plaintiff in the present suit claimed was paid to the sheriff in advance of the service, but the testimony on this point in the case was directly conflicting, and the jury having determined it in favor of the defendant, the sheriff, and the evidence being amply sufficient to sus-

tain such finding, in accordance with a well established rule of this court it will not be disturbed. The only issue raised in the trial as to this \$4.50 of the amount claimed was that it had been paid in advance, and hence the sheriff was not entitled to receive it from the moneys paid into court, and nothing further is advanced in the discussion in the brief as a reason why he should not have been paid it by the clerk, and we conclude that if determined that it had not been so paid, it was or will be conceded that he was entitled to receive it of the money paid into court of the money in Hoagland v. Van Etten as costs. Of the \$11.70 claimed by plaintiff in the case at bar, \$7.20 was the amount of fees charged by the sheriff, defendant in the action, for service of subpoenas in the case of Hoagland v. Van Etten et al., issued for witnesses in behalf of the plaintiff in such action, and were not chargeable primarily against defendant Emma L. Van Etten, and, though it was not shown, or attempted to be, that any portion of the amount was illegal or excessive as fees, or that the services for which it was charged had not been performed, yet, if the money paid into court was paid for Mrs. Van Etten and belonged to her,—and from the evidence adduced we must conclude that this was true,—it could not be applied in payment on account of fees for services performed in the case by the officer at the instance and request of the opposing party, at least not until it had been finally determined that she was liable for the payment of such costs, and no such final determination was shown in this case, and if so applied, it may be recovered of the party receiving it. This is within the doctrine announced in the case of *Cady v. South Omaha Nat. Bank*, 46 Neb., 756.

Goodin v. Plugge.

The facts or circumstances do not sustain a finding or verdict in favor of defendant as to \$7.20 of the amount involved in the action, hence such finding must be set aside. There are other errors assigned and argued, but as there must be a new trial, we need not now discuss them.

REVERSED AND REMANDED.

C. W. GOODIN V. J. H. PLUGGE.

FILED MARCH 3, 1896. No. 6274.

Alteration of Instruments: PROMISSORY NOTES: EVIDENCE.

Where a promissory note is offered in evidence, and it is apparent from an inspection that there had been a material alteration thereof it may generally be received. Whether so altered prior or subsequent to its execution and delivery, is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point. (*Bank of Cass County v. Morrison*, 17 Neb., 341.)

ERROR from the district court of Colfax county.
Tried below before SULLIVAN, J.

Phelps & Sabin, for plaintiff in error.

T. W. Whitman and H. C. Russell, contra.

HARRISON, J.

An action was instituted on a promissory note in the county court of Colfax county, and from a judgment rendered there was appealed to the district court of the same county. The defenses in-

47	284
49	293
49	452

terposed were that there had been a material alteration in the note subsequent to its execution, and duress. There was a trial to the court and a jury, resulting in a verdict and judgment for defendant; hence these proceedings in error on behalf of the plaintiff.

With reference to the defense of duress it may be said that there was not sufficient evidence to sustain it, and we will turn our attention to that in relation to a material alteration of the instrument. Counsel for plaintiff contend that it devolved upon the defendant to show by a preponderance of the evidence that there had been such an alteration, and further, that it was made subsequent to the execution and delivery of the note. The trial judge instructed the jury in reference to the burden of proof, as follows: "As to each of said defenses the burden of proof is on the defendant, and before you can find in his favor on either of said issues, he must produce a preponderance of the evidence thereon. If the evidence on either of said issues is equally balanced, or if the preponderance is with the plaintiff, you should find for the plaintiff as to such issue." The contention in behalf of defendant is, in substance, that when the defendant had offered proof which tended to show a material alteration, the burden of proof was then upon the plaintiff to explain it or establish the fact that it was made before execution. In cases in which the point here involved has arisen and been discussed and decided there appears great contrariety in the opinions, and different and opposite rules have been announced. In *Neil v. Case*, 25 Kan., 510, it was said with reference to this subject: "This is a vexed question and the books

are full of diverse decisions. Four different rules are generally stated: First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. * * * The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury, parties to such explanatory evidence of the alteration as they may choose to offer. * * * Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation.” The rule governing this question in this state was announced by the court in the case of *Bank of Cass County v. Morrison*, 17 Neb., 341, as follows: “Where a material alteration is apparent on the face of a written instrument offered in evidence, the question as to whether such alteration was made before or after the execution and delivery of such instrument is, in the last instance, one for the jury or trial court. It is, like any other fact in the case, to be settled by the trier or triers of facts. Generally, in such case, the instrument may be given in evidence, and may go to

the jury or trier of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer." The facts and circumstances of the present case bring it within the doctrine thus announced, hence it will be adopted and applied herein.

The claim in regard to the alteration of the note in suit was that it was originally made for the sum of "seventy-four and 35-100 dollars," and that in the body of the note and immediately in front of the above named words, as they there appeared, there were inserted the words "one hundred," thereby increasing it by the amount shown by the two added words, and further, that the figures in the upper left-hand corner of the note had been so changed as to indicate the note to be for the sum of \$174.35, when, as executed, such figures had shown it to be for \$74.35. There was evidence more or less positive in relation to any alteration having been made, and, if so, the time when; and we cannot say that the finding of the jury was plainly opposed to the weight of the testimony or clearly wrong. This being true, it will not be disturbed or reversed. (*McLaughlin v. Sandusky*, 17 Neb., 110, and cases cited.)

The court, in two of the paragraphs of its instructions, each referring to the alleged alterations of the note, mentioned the insertions of the words "one hundred" and the figure "1" in the same connection, coupling them together in a statement of what effect the alterations would have upon the rights of the parties to the action, and making no distinction between them. Counsel for plaintiff state in their brief: "The court erred in submitting to the jury, as the material part of the note, the question as to whether or not

the figure '1' in the left-hand top of the note had been placed there before or after its execution. These figures are not a material part of the note, and the jury should have been told that they could only consider such change in figures, if any, upon the question whether there was any alteration in the body of the note." The record discloses that the court submitted to the jury a special finding. We here give it with the answer: "The jury will answer these questions: First, was the note in suit altered after the execution by the insertion therein of the words 'one hundred'? Answer: Yes." From this it clearly appears that the verdict of the jury was based in part, if not as a whole, on a finding that the note had been altered after its execution by the insertion of the words "one hundred," and this being ascertained, it becomes evident that the fact that the question of the insertion of the figure "1" entered into the deliberations of the jury, and, by sanction of the instructions of the court, jointly with the question of the addition of the words did not prejudice the rights of the plaintiff.

Counsel for plaintiff prepared five instructions and presented them with a request that they be read to the jury. This request was refused. In the motion for new trial the action of the court in this respect was assigned for error as follows: "The court erred in refusing instructions numbered 1, 2, 3, 4, and 5, requested by the plaintiff." In the argument in the brief filed counsel for plaintiff refer to but two of these instructions, the fourth and fifth. It seems plain that the purpose for which the fifth instruction was prepared, and it was expected its giving would subserve or accomplish, was fully covered and

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effected by instructions numbered 2 and 3, given by the court on its own motion. If so, it was not error to refuse to give the one requested by counsel for plaintiff. This being our conclusion, we need not further examine any alleged errors in the refusal to give these instructions, as they were grouped in the assignment. (*Rea v. Bishop*, 41 Neb., 202.)

There are no other or further questions raised or discussed in the briefs, and, in accordance with the views herein expressed and conclusions announced, the judgment of the district court will be

AFFIRMED.

A. OLTMANNS ET AL. V. JOHN FINDLAY ET AL.

FILED MARCH 3, 1896. No. 6170.

1. **Review: ASSIGNMENTS OF ERROR: INSTRUCTIONS.** An assignment of error as to the giving of a number of instructions grouped in the assignment will be considered no further than to ascertain that any one of the group was correctly given.
2. **Bill of Exceptions: REVIEW.** To present for the consideration and determination of this court errors alleged to have occurred during the trial of a cause in district court, a bill of exceptions, settled and allowed in accordance with the legal requirements, is indispensably necessary.
3. **Instructions: ASSIGNMENTS OF ERROR: REVIEW.** If an assignment of error, which is predicated on the action of the trial court in giving several instructions, is determined to be without force as to one of the instructions given, it must be overruled as to all.
4. **Review: BILL OF EXCEPTIONS.** If in a case before this court the record of which contains no bill of exceptions, or one not authenticated as prescribed by law and which cannot be used, error is assigned based on the action of the trial

47	289
47	588
47	289
50	141
51	725
51	727
55	149
47	289
50	590

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court in giving instructions to the jury, such instructions will be presumed to be free from error, if they do not contain misstatements of the law and do not contain statements which could not be faultless under any possible conditions of the proof competent in the case, as error must affirmatively appear. If it does not, the presumption that the proceedings of the trial court were regular and without error must prevail. (*Willis v. State*, 27 Neb., 98.)

ERROR from the district court of Nemaha county. Tried below before BUSH, J.

John S. Stull and Stull & Edwards, for plaintiffs in error.

W. H. Kelligar, contra.

HARRISON, J.

The defendants in error commenced this action against the plaintiffs in error, alleging as the cause thereof, in substance, that on or about the 15th day of August they purchased of plaintiffs in error a horse, or stallion for general breeding purposes; that the value of a horse for such use depends largely upon his being well bred or pure stock; that plaintiffs in error, to induce defendants in error to purchase the horse, falsely and fraudulently represented to "them that said horse was a thoroughly bred German coach horse, registered in the stud book of Germany, and that they would furnish and deliver to the plaintiffs (defendants in error) a certificate of such registration from the stud books of Germany, showing the registration of such horse therein; that the registration number of said horse in said stud books of Germany was No. 51. Plaintiffs (defendants in error), relying upon such representations, did then

purchase said horse for the sum of \$2,200, then duly paid to the defendants (plaintiffs in error) in the negotiable promissory notes of the plaintiffs (defendants in error) delivered to defendants (plaintiffs in error)." Here followed a statement in detail that the horse was not in any of the particulars as represented, and also the failure of the parties to furnish the certificate of registration as promised, and the consequent and resulting uselessness of said horse to the purchasers for the purpose for which they had bought him, and a prayer for damages in the sum of \$1,900. The answer of plaintiffs admitted the sale of the horse to defendants in error for the sum of \$2,200, and the execution and delivery of the promissory notes of the defendants in error to plaintiffs in error in that amount; that they represented the horse to be a thoroughly bred one, averred that no part of the purchase price of the horse had ever been paid, and denied each and every other allegation of the petition. There was a trial to the court and a jury, resulting in a verdict for \$1,100 in favor of defendants in error, from which there was afterwards remitted \$400, and for the balance judgment was rendered.

One assignment of the petition in error is as follows: "The court erred in giving the 1st, 2d, 3d, 4th, 5th, 6th, and 7th paragraphs of the instructions given by the court upon its own motion." Under this, objections to some of the instructions enumerated are urged in the arguments contained in the brief filed for the complaining parties. Of the instructions against which this assignment is directed, the one designated as "1st" therein is a part of a statement of the issues, or of the cause of action as outlined in

the petition in the case, and as such is proper and not erroneous, and this being determined, it disposes of the entire assignment, as the alleged errors in relation to giving the instructions designated are not separately assigned, but *en masse*, and need not be further examined or considered.

Another assignment of error is as follows: "The court erred in giving the 1st, 2d, and 3d paragraphs of the instructions asked by the defendant in error." Instruction numbered 2, included in this assignment, reads as follows: "The court instructs the jury that if you find from the evidence that the paper introduced in evidence as plaintiff's Exhibit B was given by defendants to plaintiff, and represented at the time by defendants to be a certificate of registration or pedigree, when in fact it was neither, this fact is alone a circumstance tending to prove fraud." It is contended by counsel for plaintiff in error that the trial court, by the use of the words "when in fact it was neither," referring to Exhibit B, told the jury that the paper was not a certificate of registration or pedigree, and that this should not have been done, but the jury should have been instructed to determine from the evidence whether it was or was not such a certificate. Let it be conceded, for the purpose of argument, that the instruction was open to the objection urged against it; then, whether or not the court erred in giving it must depend upon the answer to another question, viz., was there or not uncontroverted testimony introduced that such paper was not a certificate of registration, or was such fact fully proved and without conflict in the evidence adduced in relation to it? If so, the court did not err in giving the instruction. The determination of this latter query ne-

cessitates a reference to and examination of the testimony. The document attached to the record which purports to be a bill of exceptions has never been allowed as required by law. The parties, by their counsel, stipulated that the clerk of the district court might sign and allow the bill of exceptions, but he failed to exercise the power or right thus conferred, or to perform the duty of signing and allowing it. To present for the consideration and determination of this court errors alleged to have occurred during the trial of a case in the district court, a bill of exceptions, settled and allowed in accordance with the legal requirements, is indispensably necessary, and if not authenticated it cannot be examined or used in the cause for any purpose. (*Scott v. Spencer*, 42 Neb., 632; *Glass v. Zutavern*, 43 Neb., 334.) This being true, we cannot inspect the evidence in this case to ascertain whether the fact stated to the jury by the court in the instruction requested and given was thereby proved and undisputed or not, and cannot say but that it was entirely proper for the court to give the instruction. It will not be presumed that the trial court erred. Error must be affirmatively shown. If not, the presumption must prevail that the court acted and proceeded correctly, and that the testimony was such as fully warranted the giving the instruction as read to the jury. (*Willis v. State*, 27 Neb., 98; *Romberg v. Hediger*, 47 Neb., 201.) The assignment of error was not directed to each of the instructions, but to all, and as it was without force as to one, in accordance with the well established rule of this court, it fails and must be overruled as to all. (*Wax v. State*, 43 Neb., 18.)

There are other and further assignments of

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error which are urged in the brief filed for plaintiff in error, but to arrive at a decision of the questions raised by each and all of them an inspection or investigation of the testimony given at the trial must be made, or of portions of it. We have hereinbefore determined that such evidence has not been preserved in the manner provided by law and is not before us and cannot be used herein; that errors must be affirmatively shown, and if not, it will be presumed that the proceedings of the trial court were without error in the particular of which complaint is made. It follows that the further assignments of error must be overruled and the judgment of the district court

AFFIRMED.

F. A. PJARROU V. STATE OF NEBRASKA.

FILED MARCH 3, 1896. No. 8212.

1. **Robbery: CONVICTION.** Evidence examined, and *held* sufficient to support the verdict.
2. **Criminal Law: DUTY OF COURT TO INSTRUCT.** It is the duty of the trial judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not, and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. (*Dolan v. State*, 44 Neb., 643.)
3. ———: ———: **HARMLESS ERROR.** Where there is such an omission to instruct, but it is clear that the jury have formed the right conclusion and no prejudice has resulted from the omission, it is not error which calls for a reversal of the judgment.
4. **Robbery: INSTRUCTIONS: EVIDENCE.** An instruction in this,

47	294
52	440
53	107
53	280
53	356
53	762
54	46

a prosecution for the crime of robbery, was objected to by counsel on the ground that the instruction was erroneous, in that it submitted to the jury the question of whether the accused, "either alone or in company with others," committed the acts alleged in the complaint, for the reason that there was no evidence that the defendant acted alone at any time or without the co-operation of others in the matters charged, *held*, that the testimony sustained the instruction given, in the particular indicated by the objection.

5. Instructions: FAILURE TO REQUEST: WAIVER OF ERROR.

Where it is urged as error that a designated instruction was not sufficiently explicit in its statement of the law applicable to a certain portion of the issues in the case, and it appears that no instruction was prepared by the complaining party and requested to be given in an effort to correct the alleged error, the objection cannot be sustained.

ERROR to the district court for Douglas county.
Tried below before SCOTT, J.

Pratt & Walkup, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, contra.

HARRISON, J.

October 10, 1895, there was filed in the district court of Douglas county an information in which Patrick Ford, Jr., James Gallagher, and the plaintiff in error were jointly charged with the commission of the crime of robbery in said county on September 24, 1895. Plaintiff in error was given a separate trial, convicted, and, after motion for new trial was heard and overruled, was sentenced to serve a term of three years in the penitentiary.

The first alleged error to which our attention is directed by the brief filed by counsel for plaintiff

in error refers to the fourth instruction given by the court on its own motion, and which was as follows: "If the state has proven beyond a reasonable doubt that defendant, either alone or in company with others, at and within the county of Douglas and state of Nebraska, and at any time within three years prior to the commencement of this prosecution, forcibly and by violence, or by putting in fear, unlawfully and feloniously made an assault upon the said August Volter, and that he alone, or with others, did then and there take from the person of the said August Volter money of some value with the intent to rob said August Volter, or steal said money, you should convict the defendant." It is claimed that by this instruction the jury were told that they could find the plaintiff in error guilty of robbery, or if not, must acquit him. In this connection attention is challenged to the failure of the trial court to define the crimes of larceny from the person, or assault, or any of the lesser crimes included in the crime charged in the information, and it is strenuously urged that the effect of giving the fourth instruction, and the failure to further instruct the jury, to which reference has just been made, combined, was to withdraw from the consideration of the jury the lesser crimes of which he might have been determined guilty. That it was not alone a failure to instruct in regard to the essential issues of the case or a non-direction, but amounted to more, practically to a misdirection. The information charged, as was necessary according to the definition of the crime of robbery contained in our Criminal Code, (1) the taking of the money; (2) that it was from the person of the party alleged to have been robbed; (3) with a felonious intent; (4) by

force or by putting in fear; and this charge, it is clear, included the lesser crimes of larceny,—assault with intent to commit a robbery, or a simple assault. By the plea of not guilty the charge of the information was traversed and put in issue in all its constituent elements, and to the extent that the lesser crimes were included and entered into the charge of the greater they became the subjects in the case for necessary and strict proof. The fourth instruction, the objection to which we are now considering, was, in and of itself, a fair and sufficient statement of the general rule of law applicable to the charge of the crime of robbery, and the proof necessary to be produced to warrant a conviction of such crime, and was proper in the case at bar, or, at least, was not open to this objection. There is another urged which we will notice in its order. The instructions examined and held vicious, in the opinions in several of the cases cited by plaintiff in error to sustain this contention in particular, each contained a further statement than did the one here, to the effect that if the jury did not reach the conclusion indicated by the instruction, the defendant in the case should, by the verdict, be declared not guilty, thereby precluding the consideration of the guilt or innocence of the party as to any except the direct crime charged. Such was the instruction in *State v. Vinsant*, 49 Ia., 241; also in *Beaudien v. State*, 8 O. St., 636, *Vollmer v. State*, 24 Neb., 839, and *Dolan v. State*, 44 Neb., 643.

There were no instructions given in which the lesser crimes were defined or submitted to the consideration of the jury, and allowing the return of a verdict of guilty of either of such lesser crimes, if the evidence warranted it, and did not

convict of the principal one stated in the information. There were no instructions prepared on any of these points by counsel for plaintiff in error and presented to the trial court with a request that they be read to the jury. If we view the failure of the court to instruct the jury in respect to the lesser crimes as a mere non-direction, then it may be said: "Mere non-direction by the trial court is not sufficient grounds for reversal on appeal, unless proper instructions have been asked and refused. That rule rests upon the soundest reasons and applies to criminal prosecutions as well as civil cases. (*Jones v. State*, 26 O. St., 208; *Sioux City & Pacific R. Co. v. Finlayson*, 16 Neb., 578; *Thompson*, Trials, 2339 *et seq.*)" (*Hill v. State*, 42 Neb., 503.) But if we look upon such action as more than a non-direction, as, in effect, a withdrawal of such matters from the consideration of the jury and a practical denial of the right to determine the grade of the crime committed, if any, then it may be said to amount to a misdirection, not actively or by commission, but by omission, and if by it essential issues of the case were withdrawn from the consideration of the jury, it may be reversible error. (*Carleton v. State*, 43 Neb., 373; *Dolan v. State*, 44 Neb., 643; *Metz v. State*, 46 Neb., 547; *Sterens v. State*, 19 Neb., 647.)

The defenses made in the case at bar were the general issue and the affirmative one, an *alibi*, that the plaintiff in error was not at the place of commission of the alleged crime at the time it was stated in the information to have occurred, but was then at another or different place. The plea of the general issue raised for determination the question of the guilt or innocence of plaintiff in error of the principal crime charged, or of the

lesser ones included within such charge, and the jury should have been instructed in relation to the lesser crimes, and this notwithstanding no request for such action was proffered in behalf of plaintiff in error; but, from a full and careful review of all the evidence, we are satisfied that the jury reached a correct conclusion without such instructions, and that the plaintiff in error was not prejudiced by the failure of the trial court to instruct the jury in the particulars indicated in the objection now under consideration. This being true, it was error without prejudice and not cause for a reversal of the judgment and awarding a new trial. (*Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109; *Loew v. State*, 60 Wis., 559; *York Park Building Association v. Barnes*, 39 Neb., 834; *Head v. State*, 44 Miss., 731.)

It is further urged that there is error in the fourth instruction, containing the words "defendant, either alone or in company with others," referring to the committal of the acts alleged to have constituted the robbery; that there is no evidence that he, or any of the parties informed against, acted at any time alone or without the co-operation of others. This is wrong. There is testimony, in regard to the plaintiff in error, fully warranting the submission of the question of the plaintiff in error's having committed the crime charged, alone, or in connection with his co-defendants. The determination of this question also disposes of the objection urged against instruction numbered 5.

It is contended that No. 8 of the instructions, which was in regard to the defense of an *alibi*, interposed for plaintiff in error, was vague and not a plain and explicit statement of the law gov-

erning such defense. This instruction, while it might have been so worded and framed as to make the meaning clearer and given it better expression, we think conveyed the correct sense of the rule embodied therein so clearly that no prejudice could have resulted to the rights of plaintiff in error from any possible obscurity or ambiguity in its terms. If a more explicit instruction was desired, it should have been requested. (2 Thompson, Trials, sec. 2341.)

It is urged that the evidence was insufficient to sustain the verdict. We have carefully weighed all the evidence and need not quote from or summarize it here. From our examination we are convinced of its sufficiency to support the verdict rendered. The judgment of the district court is

AFFIRMED.

**UNION STOCK YARDS COMPANY, LIMITED, V.
GEORGE E. WESTCOTT ET AL.**

FILED MARCH 3, 1896. No. 6076.

1. **Custom and Usage: EVIDENCE.** Proof of knowledge is required to give effect to a custom, unless it is so widely and generally known, and so well established, as that knowledge thereof may well be presumed.
2. **Carriers: WRONGFUL DELIVERY OF CONSIGNMENT: DAMAGES.** A carrier who delivers property, for which a bill of lading has been issued, to any one except the owner and holder of such bill is liable for the loss thereby incurred.
3. —: **BILL OF LADING: DELIVERY OF GOODS.** Directions contained in a bill of lading to notify a certain person of the arrival of the shipment at the place of destination is no authority to the carrier to make delivery of such ship-

47	300
50	460
150	465
52	409
47	300
57	530

ment to the person so to be notified, without the production of the bill of lading.

4. **Action on Indemnity Bond: LIABILITY OF SURETIES: PLEADING.** *Held*, That the petition states a cause of action against the sureties upon an indemnity bond given to a stock yards company to secure it against any act or negligence of a certain firm of commission merchants.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated in the opinion.

James M. Woolworth and Frank T. Ransom, for plaintiff in error.

Reference: *Ryder v. Burlington, C. R. & N. R. Co.*, 1 N. W. Rep. [Ia.], 747.

George G. Bowman, contra:

The sureties have a right to stand upon the strict terms of their obligations. (*People v. Chalmers*, 60 N. Y., 154; *Chase v. McDonald*, 7 Har. & J. [Md.], 160; *Law v. East India Co.*, 4 Ves. [Eng.], 824; *Lang v. Pike*, 27 O. St., 498.)

Where carriers deliver, without the production of the bill of lading, property consigned to them for transportation, they wrongfully deliver it and assume the risk. (*Hutchinson*, Carriers, sec. 130; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 573; *Nat. Bank of Chester v. Atlanta & C. A. L. R. Co.*, 25 S. Car., 216; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24; *McAleer v. Horsey*, 35 Md., 439; *Joslyn v. Grand Trunk R. Co.*, 51 Vt., 92; *Hieskell v. Farmers & Mechanics Nat. Bank*, 89 Pa. St., 155; *Dows v. Nat. Exchange Bank*, 91 U. S., 618; *Stollenwerck v. Thacher*, 115 Mass., 224; *McEntee v. New Jersey*

Steamboat Co., 45 N. Y., 34; *Houston & T. C. R. Co. v. Adams*, 49 Tex., 748.)

The custom pleaded, being opposed to the rule that a carrier is liable for a wrongful delivery without the surrender of the bill of lading, can have no effect. (*Greene v. Tyler*, 39 Pa. St., 361; *Holmes v. Johnson*, 42 Pa. St., 159; *Delaplane v. Crenshaw*, 15 Gratt. [Va.], 457; *Bassett v. Ledcrer*, 1 Hun [N. Y.], 274; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Southwestern Freight & Cotton Press Co. v. Stanard*, 44 Mo., 77; *Randall v. Smith*, 63 Me., 105; *New York Firemens Ins. Co. v. Ely*, 2 Cow. [N. Y.], 678; *Perkins v. Franklin Bank*, 21 Pick. [Mass.], 483.)

A person is not bound by a custom unless he has personal knowledge thereof. (*Walsh v. Mississippi Valley Transportation Co.*, 52 Mo., 434.)

NORVAL, J.

This was an action against A. V. Miller and C. C. Miller, as principals, and George E. Westcott, Eli H. Doud, W. G. Sloane, and Frank Pivonka, as sureties, upon a bond of indemnity. Two general demurrers were interposed to the petition, one by the principals upon the said bond, and one by their sureties. The demurrer of the Millers was overruled, and the court entered judgment against them for the amount claimed. The demurrer filed by the sureties was sustained and the action dismissed as to them. Plaintiff complains of the judgment sustaining this demurrer. The following is a copy of the bond upon which the suit is brought:

“Know all men by these presents, that we, A. V. Miller and C. C. Miller, under the firm name

of Miller Bros., as principal, and George E. Westcott, Eli H. Doud, W. G. Sloane, and Frank Pivonka, as sureties, are held and firmly bound unto the Union Stock Yards Company, Limited, of Douglas county, state of Nebraska aforesaid, in the sum of ten thousand dollars, good and lawful money of the United States, to be paid to the Union Stock Yards Company, Limited, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Signed and sealed with our seal.

“Dated this 9th day of July, A. D. eighteen hundred and ninety.

“The consideration of this obligation is such that if the above bound, or either of them, or their heirs, executors, and administrators, shall well and truly pay, or cause to be paid, to the Union Stock Yards Company, Limited, as follows: All accounts, consisting of railroad freight charges, or advanced freight charges, all feed and yard charges, and other charges that may occur, or for any damage that may occur, in the handling of stock in the aforesaid stock yards in consequence of the mixing or turning out wrong stock, or any act of A. V. Miller or C. C. Miller as principal, or their agents or employes, by reason of which the said Union Stock Yards Company, Limited, shall suffer loss or damage, or by the negligence of the said A. V. Miller and C. C. Miller's agents or employes, and to fully satisfy and to pay the same upon demand, and to deliver up all keys or other property, if any, belonging to the said Union Stock Yards Company, Limited, when called upon so to do, then this obligation to be

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void; otherwise to remain in full force and effect.

"Dated July 9, 1890.

"MILLER BROS. [L. S.]

"GEO. E. WESTCOTT. [L. S.]

"ELI H. DOUD. [L. S.]

"FRANK PIVONKA. [L. S.]

"W. G. SLOANE.

"Signed and sealed in presence of

"_____."

The petition alleges, in substance, the incorporation of the plaintiff, and that it owns and operates the stock yards at South Omaha; that the Millers were partners engaged in the live stock commission business in said city, under the name of Miller Bros.; that about the time they commenced said business at said place, and in order to receive permission to carry the same on, in, and upon plaintiff's premises, and to secure plaintiff against all acts, doings, or default of said Miller Bros. in and about the conducting of said business of live stock commission merchants, the defendants executed and delivered to plaintiff the bond set out above; that in January, 1891, one E. B. Rogers was the owner of fifty head of cattle, which he had purchased with funds furnished him by the Merchants Bank of Sidney, which cattle were then in the possession of said bank, and held by it to secure the sum of \$1,250, the amount so advanced; that said Rogers, as further security, made and delivered to said bank a draft, in words and figures as follows:

"\$1,250. SIDNEY, NEBRASKA, January 19, 1891.

"Pay to the order of Edward M. Mancourt, cashier, twelve hundred and fifty dollars, for value received, and charge the same to the account of

E. B. ROGERS.

"To Miller Bros., South Omaha, Nebraska."

That when said sum was so advanced, it was understood between the bank and Rogers that said cattle were to be shipped to South Omaha in the name of the bank, and that the bill of lading therefor should be taken from the railway company conveying said cattle and attached to a draft for the amount of the bank's advances; that on January 20, 1891, the bank shipped for its own benefit, in its cashier's name, from Sidney to South Omaha over the Union Pacific railway all of said cattle, taking the bill of lading for said shipment, showing Mancourt, the cashier, to be both consignor and consignee; that said bill of lading had the words "Notify Miller Bros." written thereon, which was a direction to plaintiff when the cattle were received in its yards to notify Miller Bros. of their arrival; that the bank attached said draft to the bill of lading and forwarded the same through the usual mode to South Omaha for collection against Miller Bros., and that by reason of said facts they were not entitled to receive said cattle until they paid said draft and obtained the bill of lading attached thereto; that said cattle were carried to, and received by, plaintiff at its yards in South Omaha, and placed in pens to await the orders of the owner, and while there Miller Bros. called upon and produced to plaintiff a written order purporting to be signed by said Mancourt, in whose name they had been shipped, directing the delivery of said cattle to Miller Bros. by plaintiff; that said order had not been signed by said Mancourt nor by his authority, but was forged, which Miller Bros. at the time well knew, yet they represented to the plaintiff that the same was genuine and that they were authorized to receive said cattle; that thereupon

plaintiff, not knowing of the rights of said bank in and to said cattle, but believing said order to be genuine, and relying thereon, and upon said representations, delivered said cattle to Miller Bros., who sold them upon the market, received the proceeds, and retained the same, and refused to pay such proceeds over to said bank or the plaintiff, or to pay said draft; that it was the custom with the plaintiff, at and before the execution of said bond, and ever since has been, to permit live stock commission men, whom the way-bill of shipment of cattle directed plaintiff to notify of the arrival thereof, to receive such cattle without the production of the usual bill of lading, and it is customary for the live stock commission merchant so notified to demand and receive the shipment without waiting the arrival of the usual bill of lading, which custom was well known to Miller Bros. and observed by them. The petition further alleges that the bank brought suit against this plaintiff for the value of the cattle, and at the request of Miller Bros., the Stock Yards Company employed counsel and defended said action upon a statement of facts furnished by Miller Bros.; that the bank recovered a judgment therein for the sum of \$1,317.07, and costs taxed at \$58.83, which sums the Stock Yards Company was compelled to and did pay, and the further sum of \$150 expended by it for attorneys' fees in defending said action, no part of which amounts have been paid by Miller Bros., although requested so to do, save the sum of \$700.

The question raised by the demurrer is whether the acts of the plaintiff in turning out the cattle in question to Miller Bros., the sale thereof by the latter, and the conversion by them of the proceeds

arising from such sale are covered by the conditions of the bonds in suit, so as to bind the sureties therein. It must be conceded that the conditions contained in this bond are broad and comprehensive in their scope and nature. They, among other things, bind the sureties to pay all loss or damages which the obligee shall sustain resulting from any act or negligence of Miller Bros. or their agents or employes. If the plaintiff was justified in delivering this shipment of cattle to Miller Bros. without requiring the production by them of the bill of lading, then it is entitled, upon the facts pleaded, to recover against the defendants sureties; otherwise the demurrer was rightly sustained. The important inquiry in the case is whether plaintiff was or was not in fault in delivering the cattle to Miller Bros. Defendants insist that the delivery was an act of negligence on the part of the plaintiff, while the Stock Yards Company contends against the proposition.

It is conceded by counsel for plaintiff that where a person delivers property, for which a bill of lading has been issued, to any one except the owner and holder of said bill, he does so at his own risk, and is liable for the value of the property. The proposition is sound and abundantly sustained by the authorities. (Hutchinson, Carriers, sec. 130, and cases cited in brief of defendants; *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb., 487.) As an excuse for the delivery of the cattle without the production of the bill of lading issued by the railway company, plaintiff relies upon the custom which it alleges existed at the time the delivery was made as well as when the bond was executed. Undoubtedly it is competent in many cases for a party to allege and prove that

a particular custom existed. As was said by the present chief justice in his opinion in *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 561: "Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character, provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties, and that they contracted with reference to it." A custom which is uniform, long established, and generally acquiesced in, and so widely and generally known as to induce the belief that the parties contracted with reference to it, is binding without proof of actual notice thereof to the parties. But a person is not bound by the custom or usage of an individual unless personal knowledge thereof is brought home to the party sought to be charged. In 27 Am. & Eng. Ency. of Law, p. 749, it is said: "In regard to the usage of a particular individual, it may be said that no person without knowledge of such usage can be bound by it in his dealings with the individual. It would be unfair to hold that the business usage of a particular bank, or merchant, or manufacturer, or hotel-keeper, could have any effect upon the rights of a person dealing in ignorance of such usage. But if the usage be known and assented to, and dealings are had with such knowledge and assent, the usage impliedly forms a part of the contract between the parties, and is therefore binding." (See *Walsh v. Mississippi Valley Transportation Co.*, 52 Mo., 434; *Stout v. McLachlin*, 38 Kan., 121; *Bliven v. New England Screw Co.*, 23 How. [U. S.], 420; *Loring v. Gurney*,

5 Pick. [Mass.], 15; *Keogh v. Daniell*, 12 Wis., 181; *Celluloid Mfg. Co. v. Chandler*, 27 Fed. Rep., 9; *Scott v. Maier*, 56 Mich., 554.) Applying the doctrine stated to the case at bar, it is obvious that the sureties are not bound by the custom set up in the petition. No general custom or usage among stock yards companies is pleaded, but that it was customary with this plaintiff alone to deliver cattle to commission men whom the way-bill directed it to notify of the arrival of the shipment, without producing the usual bill of lading. Notice of such custom to Miller Bros. is alleged, but it is not averred that the sureties had any knowledge of its existence, therefore it cannot be said that they signed the bond with reference to plaintiff's custom.

Reliance is made by plaintiff upon the fact that the bill of lading accompanying this shipment contained directions to notify Miller Bros. of the arrival of the stock at plaintiff's yards in South Omaha. It is argued that the clause referred to in the bill of lading was evidence to plaintiff that it was the intention of the shipper that the persons designated to be notified were his agents to make the sale of the cattle, and the stock yards company had a right to rely upon the honesty of such agents and trust them with the shipment. If this were true, it would have been sufficient to defeat the action brought by the Merchants Bank of Sidney against this plaintiff for the value of the stock. But the direction in the bill of lading to notify Miller Bros. did not authorize the plaintiff herein to deliver the stock without the production of the bill of lading. Hutchinson, Carriers [2d ed.], sec. 131b, in discussing this subject, says: "It is a common practice, where the bill of lading pro-

vides for delivery to the consignor's order and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified of the arrival of the goods in order that he may pay the draft and procure the goods. Such a direction to notify, however, does not dispense with the production of the bill of lading as in other cases, and if the carrier delivers the goods to the person so to be notified without requiring him to produce the bill of lading, he will be liable for the loss thereby incurred." The following cases are directly in line with the above decision: *Bank of Commerce in Buffalo v. Bissell*, 72 N. Y., 615; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *North P. R. Co. v. Commercial Bank of Chicago*, 123 U. S., 727; *Joslyn v. Grand Trunk R. Co.*, 51 Vt., 92; *Libby v. Ingalls*, 124 Mass., 503; *North v. Merchants & Miners Transportation Co.*, 146 Mass., 315; *Nat. Bank of Chester v. Atlanta & C. A. L. R. Co.*, 25 S. Car., 216. Whilst Miller Bros. were to be notified of the arrival of the stock, yet this fact did not authorize them to receive the cattle without the production of the bill of lading. The use of the words "Miller Bros." in the bill of lading showed that they were not intended as the consignees, but indicated merely that they were to be advised of the arrival of the cattle. Besides, it was stated in the bill of lading that Mancourt was the consignee, and this the plaintiff knew, or should have ascertained, before parting with the possession of the stock. Delivery could alone be safely made to the consignee or to some one authorized by him to receive the cattle.

Considerable stress is laid upon the fact that

Miller Bros. obtained possession of the cattle by reason of a spurious order for their delivery purporting to have been signed by the consignee. Of course, as between the owner of the bill of lading and this plaintiff, that fact could make no difference, since the forged order conferred no authority upon plaintiff to deliver the cattle to the persons presenting it. This is too obvious to require discussion. That the Stock Yards Company was liable to the consignee of the cattle for their value, there can be no question. If the sureties are liable to the plaintiff, it is by reason alone of the fact that their principals obtained possession of the cattle upon the fictitious order already mentioned, and failed to account for the proceeds. The question, therefore, presented for determination is whether the receiving of the shipment in controversy by Miller Bros. upon an order which they at the time knew to be forged, and which they falsely represented to plaintiff to be genuine, is within the stipulations or conditions of the bond which is the foundation of this action. Although, where a person delivers property consigned for transportation without the production of the bill of lading therefor, if one is issued, it is at his own risk, it does not follow that he is liable in damages in case the delivery is made to the party entitled to receive the same, notwithstanding the bill of lading is not exhibited or produced. The bill of lading is the evidence of the holder of his right to receive the shipment, but its surrender or production is not indispensable to a proper delivery. It would be difficult, we apprehend, to find any one to contend against this proposition. The important thing is that the shipment is received by the person entitled thereto. Had the cashier of the

bank given an order to plaintiff to deliver these cattle to Miller Bros., then it is obvious plaintiff would have been protected in turning out the stock to them though no bill of lading was produced. But that was not done. On the contrary, possession of the cattle was obtained from plaintiff by Miller Bros., who had no right to them, upon an order presented by them which they represented to be the genuine order of the owner of the stock, when they knew it was fictitious. It was this act that occasioned the loss to plaintiff, and it falls within the scope of the bond, since the sureties obligated themselves to indemnify plaintiff against loss or damage it might sustain by reason of "any act" of their principals. As between these sureties and the plaintiff, the latter, under the facts pleaded, cannot be charged with negligence in making the delivery.

It is said that the shipment would have been delivered, even though the order had not been presented, inasmuch as it was the custom with plaintiff to allow commission men to whom the way-bill directed it to notify, to receive the shipment without waiting the arrival or production of the bill of lading. Although such custom is pleaded, it does not appear that the delivery of the stock would have been made without the order, or if the fraud had not been practiced. On the contrary, it is affirmatively stated that plaintiff in making the delivery relied upon said order and the representations of Miller Bros. that it was genuine, and that they were entitled to receive the cattle thereon. It is sufficient that plaintiff had a right to, and did in fact, rely upon the genuineness of the order and the representations of Miller Bros. in parting with the possession of the cattle, although it, in

City of Omaha v. McGarock.

part, may have been influenced by its local custom. Whether reliance was placed upon the order is a question of fact for the jury upon the trial of the case. From the views expressed it follows that the petition states a cause of action against the sureties, and the court erred in sustaining their demurrer. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CITY OF OMAHA V. ALEXANDER MCGAVOCK.

FILED MARCH 3, 1896. No. 6046.

1. **Municipal Corporations: CONSTRUCTION OF VIADUCT: DAMAGES: EVIDENCE.** *Held*, That the evidence set out in the opinion was competent for the jury to consider in connection with the other evidence adduced on the trial, for the purpose of determining whether the plaintiff's property was damaged by reason of the location and construction of the viaduct in the street in front of said premises.
2. **Instructions: EXCEPTIONS: REVIEW.** The refusal of an instruction must be excepted to in the trial court, in order to lay the foundation for its review in this court.
3. ———: ———: ———. A general exception to instructions, whether given or refused, is not sufficient. Exception must be specifically taken to each instruction in order to have the same considered by the supreme court.
4. **Action Against City for Damage to Property by Construction of Viaduct: VERDICT FOR PLAINTIFF.** The verdict is supported by sufficient evidence.

· ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

47	313
48	297
47	313
55	821
47	313
58	195
47	313
58	538

E. J. Cornish and J. H. Macomber, for plaintiff in error.

Francis A. Brogan, contra.

NORVAL, J.

Alexander McGavock recovered a judgment in the court below against the city of Omaha in the sum of \$2,374.50, for damages alleged by him to have been sustained by the reason of the location and construction of the Tenth street viaduct in said city, upon which street plaintiff's property abuts. To review said judgment the city has removed the cause into this court.

The assignments of error argued in the brief of the city attorney may be divided into three groups, namely, (1) those relating to the rulings of the court upon the admission of testimony; (2) alleged errors in the giving and refusing of instructions; (3) the damages assessed by the jury are excessive and contrary to the evidence. We will consider them in the order stated.

Complaint is made of the introduction of certain testimony of J. J. Berger and John W. Bell, witnesses for the plaintiff below. The former was tenant of the plaintiff, occupying the premises in controversy for business purposes, prior and subsequent to the erection of the viaduct, which structure was completed in 1891. He testified that the travel over and along Tenth street in front of plaintiff's property previous to the construction of the viaduct was fair, and the premises were in a first-class location for the business in which the witness was engaged, but that since the completion of the viaduct only a small portion of the traffic over this street; the major portion

goes over the viaduct and some over the Eleventh street viaduct. The witness being interrogated by plaintiff's attorney, testified, over the objections of the city, as follows:

Q. What portion of the traffic has gone over the street since the construction of the viaduct?

Objected to by the defendant, as incompetent, immaterial, and not the proper way to prove damages, too remote and uncertain. Overruled and defendant excepts.

A. I should judge it was a small one-third.

Q. How does the change in the amount of traffic affect business in stores fronting on Tenth street?

A. It affects it quite an extent.

Q. To what an extent in your business?

Objected to by the defendant, as calling for a conclusion, improper, immaterial, and not the proper way to prove damages, and too remote. Overruled and defendant excepts.

A. I should guess it was about one-third; that is, I am getting one-third I used to have.

John W. Bell was called and examined as a witness on the part of the plaintiff, who, after testifying that he was engaged in the drug business in a part of plaintiff's premises, that he was familiar with the traffic on Tenth street before and since the viaduct was constructed, that prior to the commencement of the erection of the viaduct plaintiff's property was an elegant location for retail purposes, and that the construction of the viaduct destroyed the traffic and affected the business on Tenth street, testified as follows:

Q. Now, you may state in your particular case what effect the construction of that viaduct and the traffic on the old surface Tenth street have on your business.

Objected to by defendant, as incompetent, immaterial, irrelevant, and calling for a conclusion of the witness. Objection overruled. Defendant excepts.

A. It made a difference in my business by about three thousand in a year.

Q. What proportion was that of your entire business?

Objected to, as incompetent, immaterial, and irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. About one-quarter.

Q. Do you mean that your gross receipts fell off by that much, or your profits?

Objected to by defendant, as incompetent, immaterial, and irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. Do you mean from the time the viaduct was completed until I moved?

Q. I would rather take it from some definite period—some per annum, if you know.

A. My business was destroyed by that much.

Q. Can you state by what proportion your custom suffered by reason of the construction of the viaduct?

Objected to by defendant, as incompetent, immaterial, irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. From a good business to none at all.

It is argued by the city that it did not have a fair trial by reason of the introduction of the foregoing testimony. It was shown upon the trial, by numerous witnesses, the value of the real estate

in controversy, both before and after the location and erection of the Tenth street viaduct. The testimony of the witnesses upon that branch of the case was exceedingly contradictory. It is believed by my associates, although I cannot fully yield assent thereto, that the testimony quoted was competent, as tending to show that the market value of the property was greatly diminished by the building of the viaduct. If by reason of such structure the travel was diverted from the surface of the street, and the premises were not so desirable or accessible for business purposes, that was a matter for the jury to take into consideration in arriving at a verdict. So, too, it was pertinent to show that the business of the occupants of the property was affected by the improvement. Not that it was proper for the jury to base their verdict upon such fact or testimony alone, but it should be considered in connection with the other testimony adduced in determining whether plaintiff has been damaged or not. Suppose the situation of the property had been such that by the building of the viaduct it would have been more desirable for the uses for which it was intended or devoted, or for any other purpose, and the volume of business of the occupants had been greatly increased thereby. Could there be any room for doubt that the city might not have shown such facts? Clearly not. It was equally proper in the case at bar to show that the decrease of travel along and upon the surface of the street, and the destruction of the business of plaintiff's tenants was attributable to the location and erection of the viaduct. The assignments relating to the admission of the testimony above set out are overruled.

Objections are urged in the brief of the city to the giving of the fourth and fifth instructions requested by the plaintiff, and the refusing of the defendant's fifth, eighth, ninth, and eleventh. The defendant's eleventh instruction was not excepted to in the trial court, therefore no foundation is laid for its review here. (*Scofield v. Brown*, 7 Neb., 221; *Warrick v. Rounds*, 17 Neb., 412; *Nyce v. Shaffer*, 20 Neb., 507; *Darner v. Daggett*, 35 Neb., 695; *Barr v. City of Omaha*, 42 Neb., 341.) The other instructions,—those given as well as the ones refused,—of which complaint is made cannot be considered by us, because no exception was specifically taken to any of them in the district court. A general exception was taken to all, which was insufficient for the purpose of review in this court. (*Brooks v. Dutcher*, 22 Neb., 644; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290.)

It is finally insisted that the evidence fails to show that McGavock has sustained any damages by the building of the viaduct. The testimony introduced by the plaintiff in error tended to show that the fair market value of the property was not depreciated by the improvement. Some of the witnesses on that side testified to the effect that the value was the same after the construction of the viaduct as immediately prior to its location, while the construction to be placed upon the testimony of others called and examined by the city is that the property was enhanced in value by the erection of the viaduct. The several witnesses examined by the plaintiff,—the most of whom appear to be disinterested, and familiar with the property and the value of real estate in Omaha,—placed the market value of the premises before the location from \$16,000 to \$20,000, and that by

reason of the construction of the viaduct they have been depreciated from one-third to one-half. If the jury had accepted and acted upon the testimony of the plaintiff's witnesses alone, they would have been warranted in finding a verdict for a much larger sum than was returned. Considering all the testimony relating to the damages, we are satisfied it is ample to support the findings of the jury. The judgment is

AFFIRMED.

CARL STRAHLE V. FIRST NATIONAL BANK OF STANTON.

FILED MARCH 3, 1896. No. 6048.

47	319
47	704
47	319
50	335
50	508
50	586
50	798
54	513
54	759
55	461

1. **Replevin: PLEADING: EVIDENCE: CHATTEL MORTGAGES.** An allegation of general ownership, in a petition and affidavit in replevin, is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771.)
2. **Replevin by Mortgagee: VERDICT FOR PLAINTIFF.** *Held*, That the evidence fails to sustain the verdict.

ERROR from the district court of Stanton county. Tried below before NORRIS, J.

Mapes & Licey, for plaintiff in error.

John A. Ehrhardt, W. W. Young, and A. A. Kearney, contra.

NORVAL, J.

This was an action in replevin for a stock of merchandise brought by the First National Bank of Stanton against Carl Strahle. The plaintiff claimed the property under two chattel mortgages executed to the bank by one Theodore G. Asch, and the defendant claimed under the levy of an execution, placed in his hands as constable, issued upon a judgment recovered against the mortgagor. Upon the trial the jury, by direction of the court, returned a verdict for the plaintiff, and judgment was entered thereon. The chattel mortgages under which the bank claims and the notes which they were given to secure, were introduced in evidence by the plaintiff over the objections of the defendant, which rulings are assigned for error.

The petition and affidavit in replevin do not set up a special ownership in the goods and chattels in the plaintiff by reason of the giving of the chattel mortgages, but plead that plaintiff is the general owner of the property replevied. The record discloses that when the mortgages were tendered in evidence the defendant objected to their admission, "for the reason that the plaintiff has not pleaded any special ownership in the property in controversy in this action, and for the further reason that it is irrelevant, immaterial, and incompetent, and that no proper foundation has been laid for the introduction of the chattel mortgages, * * * and the affidavit upon which the action is founded makes no plea of special ownership and does not allege that any of the conditions of the chattel mortgages are broken." *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, to

the effect that a chattel mortgage transfers the legal title to the mortgaged chattels to the mortgagee, is cited to sustain the rulings of the trial court. Since the case at bar was decided by the district court, this court has overruled the decision mentioned above. (*Musser v. King*, 40 Neb., 892.) In this last case it was decided that the legal title to mortgaged chattels remains in the mortgagor until divested by foreclosure proceedings, and until then the mortgagee has merely a lien on the property; that in an action of replevin to recover the possession of mortgaged chattels by the holder of the mortgage the facts constituting his special ownership or lien must be pleaded, and that under allegations of ownership and right of possession the note and chattel mortgage under which plaintiff bases his right of possession are inadmissible in evidence. The same doctrine was held and applied in *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Murray v. Loushman*, 47 Neb., 256. Inasmuch as no claim of special ownership was made in the pleadings in the case before us, it was error to admit the mortgages and notes in evidence. There was likewise error in the ruling of the court in directing a verdict for the bank, for the obvious reason there was no evidence to show that the plaintiff was the owner of the property. At most it had but a special interest therein by virtue of the mortgages. The *allegata et probata* did not agree; hence the plaintiff failed to make out its cause of action. It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES H. JOHNSON V. DAVID REED.

FILED MARCH 3, 1896. No. 6036.

1. **Pleading and Proof.** A party is not required to prove an averment which is admitted by the pleading of his adversary.
2. **Action on Appeal Bond: EXECUTIONS.** The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the surety on an appeal undertaking given to enable the judgment debtor to appeal. (*Flannagan v. Cleveland*, 44 Neb., 58.)
3. **Principal and Surety: APPEAL BONDS: CONTINUANCE.** The mere continuance of a cause on appeal, without the consent of the surety on the appeal bond, will not release such surety. (*Howell v. Alma Milling Co.*, 36 Neb., 80.)
4. ———: ———. Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on the appeal bond was to pay any judgment rendered against the appellants. *Held*, That the surety is liable, notwithstanding judgment in the appellate court was only against one of the appellants.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

L. D. Holmes, for plaintiff in error.

Robert W. Patrick, contra.

NORVAL, J.

This was an action brought by James H. Johnson against David Reed in the county court upon the following appeal undertaking:

47	322
52	685
53	480
47	322
57	752
47	322
61	678

Johnson v. Reed.

"THE STATE OF NEBRASKA, }
DOUGLAS COUNTY. } ss.

"JAMES H. JOHNSON, PLFF., }
V. }
GEORGIANNA E. CROSSLE AND }
HENRY W. CROSSLE, DEFTS. }

"Before A. C. Read, a justice of the peace of Omaha precinct, Douglas county, Nebraska.

"Whereas, on the 27th day of December, 1888, James H. Johnson recovered a judgment against Georgianna E. Crossle and Henry W. Crossle before A. C. Read, a justice of the peace, for the sum of \$156.98, and costs of suit taxed at \$2.50, and the said defendants intend to appeal said cause to the district court of Douglas county:

"Now, therefore, I, David Reed, do promise and undertake to the said James H. Johnson, in the sum of three hundred and thirteen dollars, that the said Georgianna E. Crossle and Henry Crossle shall prosecute their appeal to effect, and without unnecessary delay, and that said appellants, if judgment be adjudged against them on the appeal, will satisfy such judgment and costs.

"DAVID REED."

"Executed in my presence, and surety approved by me, this 5th day of January, 1889.

"A. C. READ,
"Justice of the Peace."

The petition alleges the execution and delivery of the undertaking, the approval thereof, the prosecution of the appeal to the district court, the recovery therein by the plaintiff of a judgment against Henry W. Crossle for the sum of \$182.90 and costs of suit, and that the whole of said judgment is unpaid. The answer sets up affirmative

defenses, all of which, except that no execution has been issued upon the judgment recovered in the appellate court, were put in issue by the reply. At the close of the plaintiff's testimony in the suit on the undertaking the defendant moved for a nonsuit upon the following grounds:

"1. No evidence has been introduced showing that this defendant ever signed any bond as in the petition herein alleged.

"2. No execution has been issued in pursuance of the judgment in said petition alleged to have been obtained against the principals in the bond, nor any proof that any attempt has been made to collect such judgment from the said principals.

"3. That there was an alteration in the terms of the bond in the said petition pleaded without the consent of this defendant.

"4. That there was an alteration of the relations between the principals named in the bond in this petition pleaded."

This motion was sustained by the county court, and the cause dismissed. Thereupon plaintiff prosecuted error to the district court, where the judgment and ruling of the county court were sustained. To obtain a reversal of said judgment of affirmance is the object of these proceedings.

Did the district court err in affirming such judgment of the county court? The proper determination of the question requires an examination and consideration of the different grounds set forth in the motion to dismiss, which we will take up in their order.

As to the lack of evidence on the part of plaintiff to show that the defendant signed the appeal undertaking, all that we need say is that the answer admits the signing of the instrument by

the defendant. Plaintiff, therefore, was not called upon to prove the execution of the bond.

The second ground urged for the dismissal was equally untenable. There is no provision of statute which requires that an execution shall be issued upon a judgment before an action can be maintained upon an appeal bond. The conditions in the bond in suit are in the language of the statute,—that appellants will prosecute their appeal to effect and without unnecessary delay, and that said appellants, if judgment be adjudged against them on appeal, will satisfy such judgment and costs. Upon the recovery of the judgment against the principal in the bond the surety became at once absolutely liable for the payment thereof, upon the default of the principal to do so. The right of action accrued upon the bond upon the rendition of the judgment; and the failure to issue an execution is no defense. (*Flannagan v. Cleveland*, 44 Neb., 58.)

The third ground of the motion is without merit. The question of the alteration of the terms of the bond could not have arisen at the time plaintiff closed the case; but in any event no such issue was tendered by the pleadings. The alleged alteration pleaded in the answer consisted in the continuance of the cause from which the appeal was taken, when it was reached for trial, without the knowledge and consent of the surety. This constituted no defense, as it did not operate to release the surety. (*Howell v. Alma Milling Co.*, 36 Neb., 80.)

We presume the decision in the county court, as well as in the district court, was based upon the fourth or last subdivision of the motion. The judgment from which the appeal was taken was

against both Georgianna E. Crossle and Henry W. Crossle, while on the trial on appeal plaintiff recovered judgment against Henry W. Crossle alone. As the judgment appealed from was against two defendants, and in the appellate court plaintiff recovered against one of them alone, the question is squarely presented whether the surety is liable, under the terms of his bond, for the payment of this last judgment. Section 1006 of the Code declares: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." Section 1007 reads as follows: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of judgment and costs, conditioned: First—That the appellant will prosecute his appeal to effect and without unnecessary delay. Second—That if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Section 1014 reads thus: "When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." The undertaking under consideration is purely statutory, and we must look to the statute under which it was executed in determining its legal effect. In speaking of the appellants the statute

uses the singular number alone. It in unequivocal language makes the surety liable for any judgment recovered by the appellee against the appellant in the district court. Here judgment was against two in the justice court, upon a promissory note, a joint and several obligation. Either one of the defendants alone had a perfect right, under the statute, to prosecute an appeal upon giving an undertaking, and had that method been adopted it would have brought up the case as to both (*Wilcox v. Raben*, 24 Neb., 368; *Polk v. Covell*, 43 Neb., 884); and there can be no room for doubt that the surety on such undertaking would have been liable for any judgment recovered in the district court against the defendants, or either of them. While one out of two or more persons against whom a judgment has been rendered may alone appeal, he may, if he so prefers, unite with the others in the appeal by giving a single undertaking, in which event the surety on the appeal bond is liable thereon when judgment in the district court is against part of the appellants only. When two or more appeal by uniting in a single undertaking, the sureties thereon are the sureties of all, and must answer for any judgment which shall be recovered against one or all of the appellants. The effect of executing this single undertaking was to prevent an execution issuing out of the justice's court upon the judgment, against either of the appellants. The appeal, in effect, was several by each defendant, and it would be a narrow construction of the statute, and against the manifest intention of the law-makers, to hold that the surety in this case is released from his obligation merely because the judgment in the appellate court was not against both the appel-

Denslow v. Dodendorf.

lants. The precise question has been considered and passed upon by other courts in harmony with the conclusion reached by us, as an examination of the following cases will disclose: *Seacord v. Morgan*, 35 How. Pr. [N. Y.], 487; *Potter v. Van Vranken*, 36 N. Y., 629; *Bentley v. Dorcas*, 11 O. St., 398; *Alber v. Froelich*, 39 O. St., 245; *Helt v. Whittier*, 31 O. St., 475; *Hood v. Mathis*, 21 Mo., 308. The only case we have found in our investigation of the question which holds a contrary doctrine is *Lang v. Pike*, 27 O. St., 498, which was decided by a divided court, and that decision was expressly overruled by a united court in *Alber v. Froelich*, reported in 39 O. St., 245.

None of the reasons assigned in the motion made in the county court for granting a dismissal of the cause being well taken, and no other sufficient cause appearing for sustaining said motion, the district court erred in affirming the judgment of the county court. The judgment of the district court must be reversed and the cause remanded to that court, with directions to reverse the judgment of the county court.

REVERSED AND REMANDED.

JERRY DENSLOW V. IDA DODENDORF.

FILED MARCH 3, 1896. No. 6108.

1. **Justice of the Peace: FINAL ORDER: APPEAL.** It is only from a final judgment of a justice of the peace that an appeal lies. (*Riddle v. Yates*, 10 Neb., 510.)
2. **Dismissal of Appeal.** Where a district court has properly dismissed an appeal from a justice of the peace, such order

Denslow v. Dodendorf.

of dismissal will not be reversed merely because a bad reason was assigned for the decision. *Leake v. Gallogly*, 34 Neb., 859, followed.

ERROR from the district court of Dodge county.
Tried below before MARSHALL, J.

A. H. Briggs, for plaintiff in error.

T. M. Franse, contra.

NORVAL, J.

Ida Dodendorf brought suit before Hal Christy, a justice of the peace of Cuming township, in Dodge county, against Jerry Denslow to recover the sum of \$82.41 for work and labor. The parties appeared, and trial was had before the justice on July 20, 1892, who on said date spread upon his docket the following entry: "Upon the hearing of the evidence I find that there is due the plaintiff from the defendant the sum of \$82.41, and costs of this action, taxed at \$6.05. Dated this 20th day of July, 1892. Hal Christy, Justice of the Peace." On July 27 the defendant filed with the justice an appeal bond, which was duly approved. A transcript of the proceedings, including the appeal undertaking, was filed by the defendant in the district court on the 20th day of August, 1892. Subsequently the plaintiff and appellee filed in the district court a motion to dismiss the appeal, because the transcript was filed after the expiration of the time required by law, which motion was sustained and the appeal dismissed. To obtain a reversal of this decision is the purpose of this proceeding.

It is conceded by plaintiff in error that the transcript was filed in the office of the clerk of the

district court one day beyond the period allowed by statute within which to perfect an appeal, but he insists that the delay was not occasioned through his fault or laches; hence the appeal should not have been dismissed. It is disclosed that the transcript was obtained by the plaintiff in error from the justice on August 18, and upon the same day it was inclosed in an envelope addressed to the clerk of the district court of Dodge county, with postage prepaid thereon, and deposited in the post-office at Scribner, Nebraska, which was in ample time for it to have reached its destination by the usual course of mail, and to have been received and filed by said clerk within the statutory period. It is insisted by plaintiff in error that he had a right to rely upon the United States mail for the transmission of his transcript, and having mailed it in time, he exercised that degree of diligence which the law required of him in perfecting his appeal, and *Cheney v. Buckmaster*, 29 Neb., 420, is cited to sustain the proposition. That case lacks analogy. There the request for the transcript was, it is true, made by mail four days after the entry of the judgment, yet the letter making the demand was promptly received by the county judge, who negligently failed to make a transcript of the proceedings until the expiration of more than thirty days after the entry of the judgment. It was ruled that the right to appeal was not lost by the neglect or failure of the county judge to prepare the transcript in time. No laches of a public officer is imputed in this case. The question discussed by counsel herein was not involved in *Cheney v. Buckmaster*. Nor do we now propose to express an opinion thereon. Conceding that Denslow exercised due

Scott v. Kirschbaum.

diligence in attempting to perfect his appeal, and that he had a right to rely upon one of the agencies of the general government for the prompt transmission of the transcript, which we do not decide, nevertheless the appeal was rightly dismissed, for the reason no final judgment was rendered by the justice. He made findings, but rendered no judgment thereon, therefore the cause was not appealable. (*Nichols v. Hail*, 5 Neb., 191; *Riddle v. Yates*, 10 Neb., 610; *Daniels v. Tibbets*, 16 Neb., 666; *Stone v. Neeley*, 34 Neb., 81.)

It is probably true the learned district judge predicated his decision upon the ground the appeal was not taken in time, and not because there was no final order or judgment to appeal from, but that is unimportant. The essential thing is that the appeal was properly dismissed, even though the decision of the court below may have been predicated upon grounds that were not tenable. This was expressly held in *Leake v. Gallogly*, 34 Neb., 859. The judgment dismissing the appeal is

AFFIRMED.

W. T. SCOTT ET AL. V. AB. KIRSCHBAUM ET AL.

47	331
159	782

FILED MARCH 3, 1896. No. 6247.

1. **Attorneys:** COLLECTIONS: UNAUTHORIZED APPEARANCE: DAMAGES. In an action solely for money alleged to have been collected by the defendants, to whom, as attorneys at law, the collection of the same had been intrusted, a recovery for damages resulting from an unauthorized appearance by defendants as attorneys at law in an action entirely independent of the aforesaid collection cannot be sustained.

Scott v. Kirschbaum.

2. Attachment: PAYMENT BY GARNISHEES: JURISDICTION.

Garnishees, who, in good faith, pay into court money due from them to an attachment defendant, not exceeding the attachment creditor's claim in such court, cannot be held liable afterwards to pay the same amount at the suit of the attachment debtor, even though such payment as garnishees was made before jurisdiction had been acquired of the person to whom the debt was originally due from the garnishees.

ERROR from the district court of Lancaster county. Tried below before STRODE, J.

Harwood, Ames & Pettis and Sedgwick & Power, for plaintiffs in error.

References: *Wilson v. Burney*, 8 Neb., 39; *Rochereau v. Guidry*, 24 La. Ann., 294; *Ohio & M. R. Co. v. Alvey*, 43 Ind., 180; *Clough v. Buck*, 6 Neb., 343; *Meyer v. Shamp*, 26 Neb., 729.

Halleck F. Rose and John S. Bishop, contra.

References: *Russell v. Rosenbaum*, 24 Neb., 769; *Laidlaw v. Morrow*, 44 Mich., 547; *Roy v. Baucus*, 43 Barb. [N. Y.], 310; *State v. Duncan*, 37 Neb., 631; *Bryan v. Duncan*, 19 D. C., 379; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 247.

RYAN, C.

In the district court of Lancaster county the defendants in error brought suit for the recovery of the sum of \$100, and interest from February 1, 1888, and recovered judgment as prayed. In the petition Kirschbaum & Co. was described as a partnership firm doing business in Philadelphia, and the defendants were alleged to have been partners engaged in practicing law in York, Nebraska. For a cause of action in favor of the first named firm it was alleged that the firm last

named had, as attorneys at law, collected for the first named firm about February 1, 1888, the sum of \$100, which they had failed and refused to pay. By answer, Scott & Gilbert admitted that, as attorneys at law in the employ of Kirschbaum & Co., they had collected \$497.15 on February 9, 1888, but they alleged that on the same day, and immediately after the receipt of such money, said firm of Scott & Gilbert had been garnished under an attachment against Kirschbaum & Co. The action in which the garnishment process issued had been brought before a justice of the peace of York county by J. H. Hamilton, formerly sheriff of York county, upon an indemnity bond, for the recovery of certain expenses and attorney's fees which he had been compelled to advance in defending a suit brought against himself as sheriff on account of an attachment which he had levied to enforce the collection of a claim upon which suit had been brought by Kirschbaum & Co.

The case at bar has heretofore been before this court, upon which occasion a judgment in favor of Scott & Gilbert was reversed. In the opinion then delivered it was said that the questions to be determined in the district court, upon proper issues, were whether or not the garnishment was in good faith, and whether or not the action was one in which an attachment would lie. (*Kirschbaum v. Scott*, 35 Neb., 199.) As these requirements as to pleading have been satisfactorily met, there is no occasion for further reference to the former opinion. Not only have the issues presented these questions, but the evidence leaves no reason for doubt that Scott & Gilbert acted in the utmost good faith in respect to the notice of garnishment served upon them, and, having paid into court

only what they were therein required to pay by due order of the court, they have satisfactorily to Kirschbaum & Co. accounted for the balance of the collection which they held at the time notice of garnishment was served upon them.

Upon request of Kirschbaum & Co. the district court gave three instructions upon the theory which is sufficiently illustrated by the first instruction, which was in the following language: "In this case it is urged that the money sought to be recovered is in part proceeds of a collection sent by L. C. Burr, attorney for plaintiffs, to the defendants, and that, respecting the collection thereof, the defendants had no direct communication with the plaintiffs on the funds being attached. As appears from the evidence, it was the duty of the defendants to follow the directions of Mr. Burr, from whom they received the collection, in the matter of protecting the funds arising therefrom; and if you find in this case that said Burr instructed defendants that the claim was unjust, the enforcement of which was sought by an attachment, and not to appear in such case, but to require notice to non-residents to be published as required by law, and await word from their principals, and that defendants, in violation of such direction, wrongfully assumed to appear in said cause for their principals, the owners of the attached fund, and on a judgment based on such wrongful appearance, without any service of summons made or notice published therein, paid out said funds or any part thereof, then such payment would be voluntary and wrongful and defendants are liable for any sum withheld from plaintiff on account thereof." It is but fair, before discussing the principles contained in the

above instructions, to say that, as soon as the notice of garnishment was served upon Scott & Gilbert, one of these garnishees telephoned Mr. Burr's law partner of the said garnishment. The garnishment was on February 9, and in a letter of Mr. Burr's, of the date of five days thereafter, he admitted that he had knowledge of the garnishment. It was scarcely true,—certainly it was not fair to Scott & Gilbert,—to state in the instruction that it was agreed that the defendants had no direct communication with the plaintiffs on the funds being attached. As appears from the evidence, Mr. Burr was the attorney for Kirschbaum & Co., by whom their claim for collection had been sent to Scott & Gilbert; and, while in strictness these latter attorneys did not communicate the fact of the garnishment directly to plaintiffs, they did immediately notify the firm of attorneys of which Mr. Burr was a member. Perhaps a reversal should not be predicated on this part of the instruction quoted. It is, however, dangerously near prejudicial error. As we understand the theory of the above instruction, the liability of Scott & Gilbert was thereby made dependent upon either of two propositions: First, because before summons served the court had no jurisdiction, and, therefore, the failure of the garnishees to contest that fact rendered them liable to Kirschbaum & Co.; and second, because Scott & Gilbert appeared without authority as attorneys for the defendant and thereby conferred jurisdiction upon the court to render judgment against the firm of Kirschbaum & Co. In respect to this second ground of alleged liability it may properly be remarked that, so far as this record shows, Kirschbaum & Co. have never sought to have set

aside the judgment which they now claim should never have been rendered against that firm, neither has the justness of the claim of Hamilton in any way been called in question. There is, however, one thing very certain, and that is, that by the petition there was presented no such question as the right to recover damages caused by the unauthorized appearance of Scott & Gilbert as attorneys for Kirschbaum & Co. The instructions which assumed that a right of recovery had by the petition been predicated upon their alleged unauthorized appearance misstated the issues and was prejudicially erroneous.

In respect to the assumption that Scott & Gilbert were bound to contest the jurisdiction of the justice of the peace before paying money upon garnishment, defendants in error, perhaps unconsciously, assume that these garnishees were attorneys for Kirschbaum & Co. As ordinary garnishees Scott & Gilbert were entitled to be discharged from their liability to Kirschbaum & Co. by paying just as they did pay. (Code of Civil Procedure, sec. 222.) The requirement that these particular garnishees should have defended upon the ground of a want of jurisdiction of the persons of the attachment defendants certainly could not have been predicated upon the mere fact that they were garnishees. Probably the theory on which the recovery was for the most part held justifiable was that before and without service of summons the attachment had no binding force and consequently payment under and because of it, afforded no protection to the garnishees. The very well considered opinion in *Darnall v. Mack*, 46 Neb., 740, has destroyed whatever of plausibility there may theretofore have been in this con-

State v. Spirk.

tention, and no amplification of argument could do more. In any possible view of this case a recovery could not be justified, and the judgment of the district court is therefore

REVERSED.

STATE OF NEBRASKA, EX REL. EMILY J. COOLEY,
EXECUTRIX, V. EMAN J. SPIRK, TREASURER.

FILED MARCH 3, 1896. No. 7403.

School-Land Contracts: FORFEITURE: NOTICE: REVIEW.

There is, in this error proceeding, involved only a question of fact determined by the district court upon conflicting evidence. Its judgment is therefore affirmed.

ERROR from the district court of Saline county.
Tried below before HASTINGS, J.

Joshua Palmer and Abbott & Abbott, for plaintiff
in error.

A. S. Churchkill, Attorney General, George A. Day,
Deputy Attorney General, and J. H. Grimm, contra.

RYAN, C.

Emily J. Cooley, as relator, applied in the district court of Saline county for a *mandamus* requiring the county treasurer of said county to accept the money she had tendered him, and apply the same to the payment of delinquent interest, and receipt for the same according to law. The relator was the wife of Rufus Cooley, who died March 18, 1894, and she became his executrix June 15, immediately thereafter. On July 18,

1883, said Rufus Cooley purchased of the state of Nebraska the northwest quarter of the southeast quarter of section 16, in township 8, range 2 east, 6th principal meridian. This land was about three miles distant from the town of Friend and was situate in Saline county. The purchase price of the land was \$277.50, due July 18, 1893. On this sum, meantime, he was required to pay on the 1st day of January of each year \$14.98. These installments of interest he had paid for the years 1885, 1886, and 1887, but, as alleged in the petition, through mistake or inadvertency he failed to make any further payment. In 1889 Mr. Cooley took a government homestead in Cheyenne county and remained there until some time in 1890. On March 12, 1890, the contract of Mr. Cooley was declared forfeited by proper state authority, and the only question presented by the record in this case is whether or not this forfeiture was without proper notice to Mr. Cooley. It is not clear just where Mr. Cooley was living when this forfeiture was declared, but we infer from all the evidence submitted on this question that he was in Cheyenne county. His wife and children, according to the testimony of Mrs. Cooley, had their home in Lincoln, Nebraska, during the years 1889 and 1890, but she further said that her children were attending the state university, and that she and her children vibrated back and forth between Lincoln and Cheyenne county. She further testified that her husband's business address during 1889 and 1890 was in Lincoln. There were introduced in evidence a tax receipt and a redemption certificate issued by the treasurer of Saline county, both of which Mrs. Cooley testified had been sent to her

at Lincoln by the aforesaid treasurer. These were of date March 4, 1890. There was also introduced a letter from J. P. Clary, county treasurer of said county of Saline, addressed to R. Cooley at Lincoln, but as this was dated December 15, 1887, it had but little bearing upon the important fact in this case of the knowledge possessed by another county treasurer of the whereabouts of Rufus Cooley in 1889 and in the fore part of 1890. Mr. Sadilek, who was treasurer of Saline county in 1889 and 1890, and Mr. Spirk, who was during said time his deputy, each testified that he had no knowledge during that time of Mr. Cooley, and that, not being informed as to his place of residence, one of them sent a registered letter addressed to Mr. Cooley at Friend, the post-office nearest the land described in the school-land contract, in which letter was enclosed due and timely notice of the proposed forfeiture of Cooley's said contract. This registered letter was returned uncalled for, and thereafter, as shown by proof of publication thereof, there was notice published in the *Wilber Republican*, a weekly newspaper published in said county, for three consecutive weeks, being on September 5, 12, and 19, 1889, that within ninety days from the date of said notice, August 9, 1889, said school-land contract would be forfeited. This forfeiture, in fact, as already stated, was declared on March 12, 1890. In the same newspaper there was published a notice that if the amount due were not meantime paid up, the commissioner of public lands and buildings of the state would, on and after April 19, 1890, at the office of the county treasurer of Saline county, offer for lease the land described in the aforesaid school-land contract. No payment having been

made, there was made by the proper state authorities another lease of this land on February 11, 1892, to John Jahn, Jr. The district court found adversely to the relator's contention, and from a judgment to that effect she prosecutes error proceedings to this court.

Upon the question whether or not the county treasurer knew of the place of residence or address of Mr. Cooley in 1889 or 1890 there was such an amount of merely conflicting evidence that we cannot ignore the conclusion of the court in respect thereto. There seems to be no attempt by the plaintiff in error to controvert the proposition that if this fact must be taken as established, then service by publication was proper, and that, under the rules laid down in *State v. Clark*, 39 Neb., 899, the conclusions of the trial court must be sustained. We think counsel are correct in this assumption, and the judgment of the district court is

AFFIRMED.

BANKERS LIFE ASSOCIATION V. SARAH G. LISCO.

FILED MARCH 3, 1896. No. 6340.

1. **Life Insurance: WRITTEN APPLICATIONS: MISREPRESENTATIONS: EVIDENCE OF ORAL STATEMENTS.** In an action upon an insurance contract in the nature of a life insurance policy, the defendant, having alleged that the misrepresentations upon which it had acted to its own disadvantage were contained in the written application of the assured, was properly held not entitled on the trial to show what oral representations the insured had made to a physician at the time the examination was being made with a view to the approval or rejection of the insurance applied for.

47	340
52	393
52	751
54	134
47	340
58	584

2. ———: ———: AFFIDAVITS: CONTRADICTORY EVIDENCE.

On the trial of an action for the recovery of the amount of a life insurance policy, an affidavit of the beneficiary, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, it was proper to permit such affiant to show that she never knowingly subscribed to or made the statements in the affidavit contained.

3. Misconduct of Attorneys: OBJECTIONS: WAIVER OF ERROR.

Alleged misconduct of the counsel in the course of the trial in the district court, to which no objection was ruled upon, and as to which ruling consequently no exception was taken, cannot be considered in the supreme court. Following *Gran v. Houston*, 45 Neb., 813.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Gregory, Day & Day and Sullivan & Sullivan, for plaintiff in error.

Cowin & McHugh, contra.

RYAN, C.

In this action in the district court of Douglas county the plaintiff in that court recovered judgment upon a verdict in her favor in the sum of \$2,341.97. To reverse this judgment the Bankers Life Association, the judgment defendant, prosecutes error proceedings in this court.

Sarah G. Lisco, the defendant in error, was the wife of John Lisco, who, on October 28, 1889, effected an insurance upon his life by becoming a member of the aforesaid Bankers Life Association. On the 28th day of November, 1889, John Lisco died, and the present action was rendered necessary by the refusal of the plaintiff in error to pay the amount to which the defendant in error

was apparently entitled by the terms of the contract under which its membership had been bestowed upon the deceased. In brief, the refusal to make the payment was, as stated in the answer, because of misrepresentations of John Lisco as to the history and condition of his health and as to his habits, which were made in his application for membership as aforesaid. In respect to his habits it was alleged by the answer that the drinking of wine, spirits, or malt liquor had been falsely represented by the applicant not to be with him a daily habit. It was further alleged that by his excessive use of intoxicating liquors after he became a member of said association John Lisco forfeited his rights as such member. In respect to the applicant's health and the true history thereof it was by answer averred that he was subject to epileptic fits, which fact he failed by his application to disclose, though one question therein answered falsely by him should have disclosed that fact had it been answered truly. By the answer it was furthermore alleged that the death of John Lisco was caused by an epileptic fit, and that by the terms of the express conditions of the contract between the Bankers Life Association and John Lisco the above misrepresentations rendered void the claim of the defendant in error.

The evidence as to whether John Lisco was in the daily habit of using intoxicating liquors was very contradictory, and, therefore, the special finding of the jury upon that proposition cannot be disturbed. There was also evidence from which the jury might have inferred that John Lisco had been subject to epilepsy for some years before he made application for membership in the Bankers Life Association, but there was no evi-

dence that his death was caused by epilepsy. There was an apparent preponderance contrary to the showing that he had ever been subject to epilepsy, and upon this the special finding cannot be disturbed.

Of the evidence tending to establish the affirmative of the proposition last above referred to, one portion was an affidavit made by Sarah G. Lisco, the defendant in error, on January 11, 1890, in which was the following language: "I am the wife of the deceased, John Lisco, and my lamented husband has not, to my knowledge, had an epileptic fit for the last five or six years, and no other sickness, only occasionally that of sick headache, and, prior to that time not to exceed two or three fits a year—some years not any at all." This affidavit, it would seem, was sent to the Bankers Life Association at Des Moines, Iowa, and was introduced in evidence in connection with a deposition of one of the officers of the aforesaid association. It is insisted that there was error in permitting Mrs. Lisco to testify as to the ill-health with which she was suffering at the date of said affidavit, and that she never knowingly subscribed or swore to the above quoted statements. We have had called to our notice, and have been able to discover, no good reason why Mrs. Lisco should not have been permitted to deny these statements imputed to her. The weight to be given such denial was solely a question of fact to be considered by the jury.

The matters of defense pleaded in the answer to avoid the alleged liability of the plaintiff in error were all predicated upon written statements made in the application of Lisco. It was therefore improper to prove that oral statements were made by Lisco to the medical examiner outside the writ-

ten matters pleaded as aforesaid for the purpose of obtaining insurance,—at least, we are unaware of any theory on which such evidence could be competent, and upon this point there was no attempt to enlighten by offers of what the proposed testimony would disclose, if permitted to be given. The district court therefore properly sustained an objection to the question propounded as to what these statements were, which were made to the medical examiner, and which were not included in the written application.

It is urged in the petition in error that the court erred in failing to state to the jury that in the answer it was pleaded that John Lisco warranted his statements in the application to be true. It may be that the force of this objection is not clearly understood, but it does seem to us that plaintiff in error has no just cause of complaint in view of the following considerations: The court in describing the answer used this language: "The defendant claims in its answer that the said Lisco in his application for insurance misrepresented, and made untrue answers of his physical conditions, and that by reason thereof said certificate had become null and void." The certificate referred to in the above instructions, in so far as it should be considered in this case, was described in the pleadings, and throughout the trial was treated as performing the same offices as are ordinarily performed by an insurance policy. In the first, fourth, and sixth instructions given upon the request of the plaintiff in error the jury were in express terms told that the several representations amounted to warranties, and we cannot see why any failure in the description of the issues in this respect raised by the answer was not cured,

if indeed a fuller description thereof was necessary, which we greatly doubt.

To instructions 1, 2, 3, and 4, given by the court upon its own motion, a single exception, in gross, was taken, and in the motion for a new trial the same method was pursued. Although by the amended petition in error the correctness of the particular instruction given by the court numbered 2 is challenged separately from any other, we are not justified in overlooking the above described previous grouping of the instructions, and, as some of them were undoubtedly given properly, we cannot consider whether or not there was error in giving instruction numbered 2, separately assailed by the amended petition in error.

It is finally urged that there was misconduct upon the part of the counsel for the defendant in error, as asserted, in presenting as facts a whole series of matters which were outside the record, were not embraced in any evidence, and in reality were untrue. While the fact that objection was made to this language was recited in the affidavit, in which alone is there found any reference to this part of the trial, there was no ruling upon or exception as to such ruling taken by the plaintiff in error. This was indispensably necessary to secure a review of alleged errors of this nature. (*Gran v. Houston*, 45 Neb., 813.)

There being discovered no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

47	346
58	453
47	346
158	149

**R. A. MOORE, APPELLANT, V. C. R. SCOTT ET AL.,
APPELLEES.**

FILED MARCH 3, 1896. No. 5983.

1. **Vendor and Vendee: MISREPRESENTATIONS: EVIDENCE: RESCISSION.** One who, as an inducement to a sale of land, in good faith states to the vendee that reliable third persons have represented the land to him as being of a certain character, and who at the same time states that he has no personal knowledge in regard to the land, does not thereby adopt such representations as his own, and rescission cannot be had merely because they prove false.
2. ———: ———: ———: ———. The statement that such third persons are reliable, being merely the expression of an opinion, is insufficient to charge the vendor in an action to rescind, at least where he honestly believed them reliable when the statement was made.
3. **Mistakes: EQUITY: MISREPRESENTATIONS.** The jurisdiction of equity to relieve against mutual mistakes is, in general, confined to cases where, because of such mistake, the minds of the parties never met, and there was therefore no contract, and to cases where the contract made was not correctly expressed by the instrument evidencing it. Relief cannot be given because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

R. A. Moore, pro se.

References: *Hook v. Bowman*, 42 Neb., 80, 87; *Mead v. Bunn*, 32 N. Y., 275; *Olson v. Orton*, 28 Minn., 36; *Harvey v. Smith*, 17 Ind., 272; *Wilson v. Yocum*, 42 N. W. Rep. [Ia.], 446; *Armstrong v. Helfritch*, 51 N. Y., 856; *McClellan v. Scott*, 24 Wis., 87;

Simar v. Canaday, 53 N. Y., 298; *Syms v. Benner*, 31 Neb., 593; *McKnight v. Thompson*, 39 Neb., 752; *King v. Sioux City Loan & Investment Co.*, 39 N. W. Rep. [Ia.], 919; *Galloway v. Merchants Bank of Neligh*, 42 Neb., 259; *Barnard v. Roane Iron Co.*, 2 S. W. Rep. [Tenn.], 21; *Union Central Life Ins. Co. v. Huyck*, 32 N. E. Rep. [Ind.], 580; *Fisher v. Mellen*, 103 Mass., 505; *Busterud v. Farrington*, 31 N. W. Rep. [Minn.], 361; *Billings v. Aspen Mining & Smelting Co.*, 2 C. C. A., 260; *Wheeler v. Smith*, 9 How. [U. S.], 55; *Smith v. Richards*, 13 Pet. [U. S.], 26; *Berrer v. Moorhead*, 22 Neb., 691; *Singer Mfg. Co. v. Doggett*, 16 Neb., 611; *Evarts v. Smucker*, 19 Neb., 43; *Carmichael v. Dolen*, 25 Neb., 335; *Klosterman v. Olcott*, 25 Neb., 387; *Hale v. Wigton*, 20 Neb., 83; *Holcomb v. Noble*, 37 N. W. Rep. [Mich.], 497; *Bridge v. Penniman*, 12 N. E. Rep. [N. Y.], 19; *Reeve v. Dennett*, 11 N. E. Rep. [Mass.], 938; *Baughman v. Gould*, 45 Mich., 483; *Wagner v. Lewis*, 38 Neb., 320; *Groppengiesser v. Lake*, 36 Pac. Rep. [Cal.], 1036.

C. R. Scott, contra.

IRVINE, C.

In January, 1888, a contract was entered into between Moore and Scott, whereby Scott assigned to Moore his rights under a contract for the purchase of 1,600 acres of land in Lincoln county. The consideration for this transaction was a conveyance by Moore to Scott of a lot in the city of Kearney, the transfer of a note for \$300 made by F. H. Gilcrest & Co., a note of Moore's to Scott for \$50, \$5 in cash, and a box of cigars. This action was brought by Moore to rescind the contract. The Kearney Savings Bank and F. H.

Gilcrest were made defendants under allegations that the bank held the Gilcrest note and was about to collect it and pay its proceeds to Scott, the object of joining them being to obtain an injunction against the payment of the note to the bank by Gilcrest and its collection and payment of the proceeds to Scott. The Bandera Flag Stone Company intervened, claiming to be a *bona fide* purchaser from Scott of the Gilcrest note. The rights and claims of all the defendants except Scott may, however, be disregarded as the case turns upon the issues joined between Moore and Scott and the decree thereon. The court found the issues generally in favor of the defendants, and from a decree of dismissal entered upon that finding the plaintiff prosecutes an appeal.

The ground upon which rescission was sought by Moore was false representations in regard to the character of the land, alleged to have been made by Scott. These were, in brief, that the land was nearly all good tillable land, a little rolling, but with valleys in it, and covered with a good growth of grass; that there was not enough sand upon it to prevent its being good farming land; that water could be obtained at a depth of fifty or sixty feet, and that the land was actually worth \$4.50 an acre. It may be assumed as established that the land was not in these respects as plaintiff claims it was represented. Scott, however, denies that he made such representations, but avers the fact to be that he informed the plaintiff that he had never seen the land and had no personal knowledge of its character, quality, or value, and would not be responsible for its character or quality upon that account. This was the controlling issue

presented by the pleadings, as determined by their legal effect. As determined by their volume, the issues presented were more of the character indicated by the following excerpts from the answer and reply: The answer pleads that Scott was at the time in Kearney attending court, and that "while so in attendance upon said court, said plaintiff, through the kindness of his heart and realizing that this defendant was a stranger in that part of God's heritage, kindly took this defendant in and gave him meat and drink; that this defendant was then wholly unacquainted with the ways that are dark and the tricks that are vain on the part of said plaintiff, partook of his hospitality, being captivated by his blandishments and pretexts of friendship for the stranger." This allegation is met in the reply by the following: "Admits that part of the answer where the defendant alleges that he was given meat and drink by this plaintiff, and this plaintiff alleges that it was the most expensive meat and drink he ever dealt out to friend or foe; that relying upon the former friendship existing between this defendant and plaintiff, and not realizing that he was a wolf in lamb's clothing, and supposing that he was a friend, this plaintiff invited him into his home and sat down with him in his parlor and introduced him to his family, and that many a time since he has had reason to repent in sackcloth and ashes that he ever proffered said act of friendship and kindness; that the said defendant sat at his table, broke his bread and ate of his salt and drank of his wine and smoked his Havana cigars." Disregarding such issues as these and the evidence which incidentally crept in in an attempt to support them, the case may be sum-

marized by stating that the plaintiff's evidence tended strongly to support the allegations of his petition; while the evidence on the part of the defendant was equally positive to the effect that the defendant had at all times disclaimed personal knowledge of the character and value of the land; but that he had told the plaintiff that certain persons, whom he deemed reliable and to whom he had been referred by his own vendor, had made statements in regard to the land substantially similar to those which the plaintiff charged the defendant with making. On this conflicting evidence the finding of the trial court must be accepted as conclusive of the facts in favor of the defendant; and the question is, therefore, assuming those facts to be in accordance with defendant's testimony, did the plaintiff make out his case?

It is true, as contended by plaintiff, that this court has repudiated the doctrine that in order to make out a case of deceit, it must be shown that the defendant knew his representations to be false. The *scienter* is not material. (*Foley v. Holtry*, 43 Neb., 133; *Phillips v. Jones*, 12 Neb., 213; *Hook v. Bowman*, 42 Neb., 80; *Johnson v. Gulick*, 46 Neb., 817.) But in all of these cases it is either expressly stated or necessarily implied that in order to be actionable the representations must have been made as a positive statement of existing facts. Now in this case, assuming, as we must, that the defendant's account of the transaction is correct, the fact represented was that persons whom the defendant deemed reliable so represented the land to him. The defendant did not represent these matters in regard to the character of the land as facts within his knowledge, but he

affirmatively disclaimed all knowledge in relation thereto. There is a class of cases where a party to a contract refers the other party to a third person for information, where it is held that in so doing he makes such third person his agent for the purpose of making the representations and binds himself by the representations so made to the other party in pursuing that recommendation. A case of this class is *Witherwax v. Riddle*, 121 Ill., 140. But in addition to there having been an express reference to the third person held out as knowing the facts, this third person was represented as being a reliable man, whereas in fact he was a fugitive from justice, and the decision of the court to a certain extent was based upon the fact that he was held out as a reliable man, when the defendant knew otherwise. In the case before us the same representation was made as to the reliability of the persons from whom defendant obtained his information; but the case is distinguishable on two grounds: In the first place, when a man is held out simply in general terms as a truthful and reliable man, this must necessarily be merely the expression of an opinion; and there is here nothing to show that the reputation and character of the men named by the defendant were not as represented. In the second place, Scott did not refer Moore to these men for information. He merely stated to Moore what they had informed him; and there is nothing to show that he did not truthfully state it. A case directly in point is *Cooper v. Lovering*, 106 Mass., 77. In that case a vendor read to the vendee certain letters received from his brother, containing statements in regard to the property. The court said: "If he intentionally misstated their contents, that

would amount to a misrepresentation of a material fact, and would come within the established definition of deceit. If he knew that the information contained in the letters was false, and that the writer was not 'trustworthy and reliable,' it would of course be fraudulent if by words or acts he induced the defendant to act and rely upon them, and to incur damage and loss by such reliance; but if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowledge on the subject-matter, such representations on the plaintiff's part would not be fraudulent."

At some time during the trial the plaintiff asked leave to amend his petition by asking rescission on the ground of mistake. Leave to so amend was refused. The amendment tendered alleged the same representations as the original petition and averred that the contract was entered into because both parties by mistake believed the facts to be as represented. We do not think that a ground for relief from mistake was shown, and, therefore, there was no error in refusing the amendment. As we understand the law, the jurisdiction of equity to relieve against mutual mistakes does not extend to all cases where the parties to a contract at the time it was made were in ignorance of, or misapprehended some matter incidental to the subject of the contract. If that were so, and A sold his farm to B, he might rescind on its being subsequently discovered that there was a valuable vein of coal or other mineral underlying the land. As we understand it, the

mistake against which a court of equity grants relief is such as either discloses that the minds of the parties never met, and that there was, therefore, no contract; or else where the contract was defectively executed so as not to express the real agreement of the parties. (Pollock, Contracts, p. 392*; 1 Story, Equity Jurisprudence [13th ed.], sec. 140, note A; 2 Pomeroy, Equity Jurisprudence, sec. 853.) Thus, if a contract be made for the sale of land to which it turns out that the vendor had no title, relief may be had; and likewise if the conveyance misdescribed the land actually sold. In one case there may be a rescission, in the other a reformation. But where there is actually sold the land which the parties had in contemplation, a mere erroneous impression in regard to a collateral matter affecting the value of the land is not a mistake justifying the interposition of a court of equity. In *Billings v. McCoy*, 5 Neb., 187, the case made was that a number of cattle had been sold at the price of four and one-half cents per pound; that a mistake had been made in keeping account of the weight of the cattle, whereby too large a sum had been paid. It was held that the excess could be recovered back. But when this transaction is scrutinized, it was a sale of cattle at so much per pound, so that the purchaser did not get what he had paid for in consequence of the mistake. If the contract had been for the sale of so many head of cattle at an aggregate price, or at so much per head, the parties merely believing that the cattle weighed a certain number of pounds, when in fact they did not weigh so much, there certainly could have been no recovery.

There are other assignments of error, but they

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relate to the admission of evidence which it is claimed was incompetent or immaterial. Under the long established rule a judgment in a case tried without a jury will not be reversed on account of errors in admitting evidence where there is sufficient competent evidence to sustain the finding.

JUDGMENT AFFIRMED.

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J. M. BARRY ET AL. V. M. DELOUGHREY ET AL.

FILED MARCH 3, 1896. No. 6194.

1. **Highways: JURISDICTION OF COUNTY BOARD.** No petition is necessary to confer power upon a county board to open a section line road.
2. **Opening Section Line Roads: NOTICE: DAMAGES.** The county board may, without petition or notice, make a preliminary order establishing a section line road, or declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages.
3. ———: **PROCEDURE.** To authorize the opening of a section line road a finding that the public good requires it need not be made of record by the county board.
4. ———: ———. The county board may in one proceeding open roads on different section lines, provided they connect with one another and form a single scheme of highway improvement. Whether the opening of disconnected roads may be embraced in a single proceeding, *quære*.

ERROR from the district court of Dakota county.
Tried below before NORRIS, J.

Jay & Beck, for plaintiffs in error.

R. E. Evans, contra.

IRVINE, C.

The object of this proceeding is to procure a reversal of a judgment of the district court which reversed, on proceedings in error in that court, an order of the county board of Dakota county relating to the establishment of a highway. Unfortunately most of the information sought to be afforded us is contained in the briefs, and finds little support in the record, by which alone we are governed. The record discloses that on April 23, 1892, there was filed with the county board a petition purporting to be signed by a large number of electors residing within five miles of the proposed roads, asking the establishment of two roads along section lines, joining at a section corner. To this a numerously signed remonstrance was filed, accompanied by specific objections to the opening of the roads. A notice was published, which will be referred to later. Thereafter certain of the remonstrants asked to have their names stricken from the remonstrance. Thereafter, at a meeting of the county board, the following record was made: "Now at this time in the matter of the Ryan section line road the same came up for final hearing and was allowed as prayed for. The remonstrants duly except to the action of the board. Motions of R. E. Evans, attorney for remonstrators in the location of Ryan road, were overruled and remonstrators except." From this order the proceedings in error were prosecuted in the district court, resulting in a judgment of reversal, the reason stated being "that said board of supervisors had no jurisdiction of the subject-matter of the action and no authority to render such judgment or order."

In support of the judgment of the district court counsel argue that the board was without authority, because no sufficient petition was filed, because no proper notice was published, because there was no finding that the roads were required for the public good, and because the opening of two roads was embraced in a single proceeding. The district court must have proceeded on one or another of these grounds, because the other assignments of error are not based on any facts disclosed by the record. All section lines are by statute declared to be public roads. (Compiled Statutes, ch. 78, sec. 46.) The law establishes them as highways, and the county board is empowered, whenever the public good requires it, to open such roads without preliminary survey, the sole limitation being that damages shall be appraised as nearly as practicable in the manner provided for the opening of other highways. Under this section it has been held that the board may in its discretion open any section line road without a petition first presented. (*Throckmorton v. State*, 20 Neb., 647; *McNair v. State*, 26 Neb., 257; *Howard v. Brown*, 37 Neb., 902; *Rose v. Washington County*, 42 Neb., 1.) In *Howard v. Brown*, *supra*, it was held that section 46, being a special provision in relation to section line roads, prevailed over the general provisions of the chapter; but, of course, in appraising damages section 46 requires the procedure in relation to other roads to be followed so far as practicable. The procedure provided for such other roads is the presentation of a petition and deposit by the petitioners of a sufficient sum to pay for laying out such road. Thereupon the county clerk appoints a commissioner to examine into the expediency of the road.

The commissioner makes his report and a notice is published fixing the time wherein all objections to the road or claims for damages must be filed. Thereafter the board, after considering such matters, determines upon the establishment of the road. A portion of this procedure is clearly inapplicable to section line roads; but there can be no doubt that it must be followed in so far as the procedure for ascertaining damages is concerned. Before making the order here complained of the county board had undertaken to publish a notice; but it may be assumed that it was not in substantial compliance with the statute and was insufficient to justify the board in proceeding with the actual opening of the road; but the order made was not one for such final action. It is unintelligible, except through the petition to which it refers; and the petition is for the establishment of the road. We regard the order as merely a preliminary order looking to the opening of the road. Section line roads being opened in the discretion of the board without the necessity of a petition, survey, or commissioner's report, some such preliminary action must be taken before damages can be ascertained. In *McNair v. State, supra*, the proceedings were instituted by a motion adopted by the county board establishing the road, and thereafter the statutory notice was published. This court held that a road so opened was lawfully opened and could not be vacated except by regular procedure. It was also held in *McNair v. State* that a finding that the public good required the road need not be entered of record. As to the objection that the proceedings referred to two roads, as these were both along section lines, joined one another and formed a single scheme of

highway improvement, there could be no objection to the procedure on this ground. Whether two disconnected roads can be opened by a single proceeding we need not determine. The proceedings of the county board, so far as they had progressed, were not without authority of law; and the record discloses no irregularity presented by proper assignments of error. The judgment of the district court is reversed and the order of the county board affirmed.

JUDGMENT ACCORDINGLY.

A. NORRIS DOUGLAS ET AL., APPELLEES, CARRIE I. HAWKS ET AL., APPELLANTS, V. FANNIE E. CAMERON ET AL., APPELLANTS.

FILED MARCH 3, 1896. No. 8190.

1. **Descent and Distribution: CONSTRUCTION OF STATUTE.** A. died intestate, leaving surviving him neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. *Held*, That under our statute of descent the twelve surviving nephews and nieces took each one-twelfth part of the intestate's land, *per capita*, and that the grand-nephews and grand-nieces took nothing.
2. ———. Such a case falls within the fifth subdivision of section 30, chapter 23, Compiled Statutes, and not within the third subdivision.
3. ———. Inheritance *per stirpes* does not obtain under our law except where affirmatively provided.
4. ———. The rule of inheritance *per stirpes* is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate. Where they are of equal degree, they take as principals.

Douglas v. Cameron.

5. ———. It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate to the exclusion of those more remote.

APPEAL from the district court of Cedar county.
Heard below before NORRIS, J.

W. E. Gantt, for appellants.

References: *Ewers v. Follin*, 9 O. St., 327; *Dutoit v. Doyle*, 16 O. St., 400; *Cox v. Cox*, 44 Ind., 368; 24 Am. & Eng. Ency. Law, 391, and cases cited; *Van Cleve v. Van Fossen*, 41 N. W. Rep. [Mich.], 258; *Blake v. Blake*, 85 Ind., 65; *Snow v. Snow*, 111 Mass., 389; *Knapp v. Windsor*, 6 Cush. [Mass.], 156; *Balch v. Stone*, 20 N. E. Rep. [Mass.], 322; *Nichols v. Shepard*, 63 N. H., 391; *Wagner v. Sharp*, 33 N. J. Eq., 520; *White v. Williamson*, 2 Grant [Pa.], 249; *Miller's Appeal*, 40 Pa. St., 387; *Jackson v. Thurman*, 6 Johns. [N. Y.], 322*; *Pond v. Bergh*, 10 Paige Ch. [N. Y.], 140.

J. M. Woolcorth and *J. P. English*, contra.

References: *Schenck v. Vail*, 24 N. J. Eq., 538; *Quinby v. Higgins*, 14 Me., 309; *Davis v. Stinson*, 53 Me., 493; *Wimbles v. Pitcher*, 12 Ves. [Eng.], 433; *Bigelow v. Morong*, 103 Mass., 287; *Conant v. Kent*, 130 Mass., 178; *In re Curry's Estate*, 39 Cal., 529; *Clayton v. Drake*, 17 O. St., 368.

IRVINE, C.

Abijah Hart Norris died intestate August 31, 1894, seized of a large quantity of land in Dixon county. He left no issue, and no surviving father, mother, brother, or sister. A brother and a sister

had, however, died before him. The sister had nine children, eight of whom survived the intestate, as did three children of the deceased daughter of the sister. Four children of the brother survived the intestate. This was an action for partition brought by the eight children and three grand-children of the deceased sister, as plaintiffs, against the four children of the deceased brother. The district court held that the three grand-children of the deceased sister took no estate, and confirmed in each of the surviving children of the brother and sister a one-twelfth interest,—that is, the estate was divided among the intestate's surviving nephews and nieces *per capita*. From this judgment the defendants, the four children of the deceased brother, appeal, contending that the estate should have been divided into halves, one-half to be subdivided among them, and the other half among the children of the deceased sister,—that is, their contention is that the inheritance was *per stirpes* instead of *per capita*. The three grand-children of the deceased sister also appeal, contending that their exclusion was erroneous; that the intestate's nephews and nieces should take *per capita*, each one-thirteenth; and that they should take among them the portion which would have gone to their mother had she survived the intestate.

The question presented is purely one of statutory construction. But little direct light is thrown upon it by the authorities, because,—as aptly suggested in one of the briefs,—cases relating to the construction of statutes, especially such statutes as we must now consider, depend so much upon the peculiar phraseology of the statute that apparently slight differences in language may

have a most important bearing, and render a foreign adjudication a source of danger rather than an aid. None of the statutes passed upon by the cases to which we have been cited is exactly like our own, although those of Michigan and Massachusetts are so nearly like ours as to render the decisions of those states helpful in a general way. We will, therefore, forbear reference to cases of other states, except where those cases tend to throw light upon the general theory of modern statutes of descent and the policy of their construction; but this last phrase suggests a comment which should be made in answer to certain arguments in the briefs. With the wisdom or justice of the statute we have nothing to do. The statutes of descent are creations of positive law, and effect must be given to them according to their obvious meaning, regardless of contingencies which the court might think the legislature should have provided for, and regardless of our own notions of abstract justice. (*Shellenberger v. Ransom*, 41 Neb., 631.) In cases of ambiguity the fact that a particular construction would lead to an absurd or manifestly unjust result may be a reason for presuming that the legislature did not intend such construction. Beyond this such reasoning is without value. Our statute is as follows: "When any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein in fee-simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: First—In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the intestate

living at his death, his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally; otherwise they shall take according to the right of representation. Second—If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and, after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father. Third—If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; *Provided*, That if he shall have a mother also, she shall take an equal share with his brothers and sisters. Fourth—If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister. Fifth—If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote; *Provided, however*, Sixth—If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married; all the estate that came to the deceased child, by inheritance from such deceased parent, shall descend in equal shares to the

other children of the same parent and to the issue of any such other children who shall have died, by right of representation. Seventh—If, at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child, by inheritance from his said parent, shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally; otherwise they shall take according to the right of representation. Eighth—If the intestate shall leave a widow and no kindred, his estate shall descend to such widow. Ninth—If the intestate shall have no widow, nor kindred, his estate shall escheat to the people of this state.” (Compiled Statutes, 1895, ch. 23, sec. 30.) The first group of appellants claims that the case falls under the third subdivision of the section quoted; while the second group, the sister’s grand-children, claims that it falls under the fifth subdivision. Strictly speaking, it must fall within one or the other of these provisions, although in determining which, and the construction to be given the clause found to apply, the whole section must be construed together. Indeed, the grand-children referred to, in order to make out their claim, are compelled not only to bring the case within the fifth clause, but to engraft upon that clause the principle of representation found in the third clause.

We shall first consider the contention of the four defendants, the children of the deceased brother. Sir William Blackstone, after defining inheritance *per stirpes*, says, speaking of the civil

law: "And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother * * *), the succession was still guided by the roots; but, if both of the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita*,—that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third, his inheritance, by the Roman law, was divided into six parts, and one given to each of the nieces, whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother." (2 Blackstone, Commentaries, 217.) This is stated as the common law rule; but immediately following what we have quoted the reason therefor is given that it is a necessary consequence of the preference given at the common law to male issue and to the first-born among the males, to both of which the Roman law is a stranger. (2 Blackstone, Commentaries, 218.) Blackstone's discussion of the canons of descent has been by no means free from criticism; but whether or not he in this respect accurately stated the provisions of the civil and of the common law, and the reasons for their distinction, his words are of great importance, because during the whole formative period of the American law of descent, at least

outside of the original colonies, Blackstone's Commentaries was generally accepted as the embodiment of the common law. Every student resorted to it as teaching the elements of his profession. Most practitioners regarded it as the authoritative statement of the English law at the period of separation. So that those who framed the existing statutes of descent may safely be presumed to have been guided largely by what is there said as to rules of law which they were about to redeclare or alter, and as to the reasons for their existence. Referring to the text in this light, it is significant that in America the most general and earliest departures from the common law were in the abolishment of primogeniture and the preference of males. These changes swept away the reasons given by Blackstone for representation among collaterals; and it must have been in the minds of the framers of the statutes to follow another maxim frequently expressed by Blackstone, and sweep away the law itself, together with the reasons for its existence. Accordingly we find Chief Justice Shaw saying in 1850: "It is a plain rule of law, that those who take property, as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares" (*Knapp v. Windsor*, 6 Cush. [Mass.], 156); and elsewhere in the opinion it is said that the expression in the statute, of a preference in the same words as that contained in the fifth clause of our statute, shows that in other cases heirs take *per capita*, and again: "The rule of representation applies only from necessity, or where there are lineal heirs in different degrees." As before remarked, the statute of Massachusetts is very much like our own. So

similar in fact that it is more than probable that directly or indirectly ours was modeled upon that upon which Chief Justice Shaw was commenting; so that his language is entitled to especial weight. The point, however, we desire to impress is that at the time he wrote, representation in America was not presumed, but was only applied where the statute affirmatively provided therefor. Other Massachusetts cases of less weight as indicating a general policy of the law, but more directly in point as to interpretation, are *Snow v. Snow*, 111 Mass., 389, and *Balch v. Stone*, 149 Mass., 371. The significance of these cases is chiefly in the fact that they construe such language as "next of kin in equal degree" as implying a taking *per capita* by the class described. The case of *Houston v. Davidson*, 45 Ga., 574, is also instructive as indicating that a *per capita* distribution is intended except within the degrees where representation *per stirpes* is expressly provided. Indeed we understand counsel for the defendants to practically concede this point by admitting that if the case does not fall within the third subdivision, which provides for representation, a distribution *per capita* must be made. We think, however, the case falls within the fifth and not the third clause. The section undertakes to provide a complete scheme of descent, beginning with the issue of the intestate, exhausting all blood kindred, providing for a single case, that of the widow, where the inheritance is made to pass by affinity in the absence of kindred by blood, and ending with escheat to the state. The first clause provides that the children shall take in equal shares, and the lawful issue of any deceased child by right of representation. This is followed by an express provision

whereby if no child of the intestate survive him, the estate shall descend to the more remote descendants *per capita*, if they are all in the same degree, otherwise *per stirpes*. This clause is significant on the question before us, in this: that thus at the very outset we find that the rule is different where one child survives, and where they are all dead. Representation is almost uniformly recognized more fully in the case of direct descendants than in the case of collaterals; and, therefore, it would be a strange thing if the legislature should provide for a descent *per capita* among lineal heirs under circumstances where the descent would be *per stirpes* among collaterals. The fact that this distinction is created in the first clause is of service in construing the third, fourth, and fifth. The second clause is unimportant to the discussion, except that by the joint effect of the first and second, lineal heirs, both in the ascending and descending line, are provided for, so that with the third clause the consideration of collateral begins. The third provides that in the absence of issue, widow, and father, the estate shall descend in equal shares to brothers and sisters "and to children of any deceased brother or sister, by right of representation." It is contended that the case before us is covered by this clause, and that the provision for representation in favor of the children of "any" deceased brother or sister extends to the case where all brothers and sisters are deceased. If this were true, as we have already suggested, it would be somewhat remarkable in view of the express provision to the contrary in the case of deceased children, but we think the subsequent clauses show that it is not true, and expressly carry out the analogy of the

first clause. The third provides for the absence of issue, widow, and father; and the prior death of "any deceased brother or sister." The fourth provides for a case where there is neither issue, widow, father, "and no brother nor sister living at his death." In this case the estate goes to the mother to the exclusion of the issue of any deceased brother or sister. Here, then, is evidently a case not within the third section, for the sole reason that there is no surviving brother or sister. In determining whether or not a case falls within the third or fourth clause it becomes absolutely necessary to interpret the third clause as, if following the phrase "any deceased brother or sister," there was added "a brother or sister surviving." Then comes the fifth clause, which provides for the case where there is left neither issue, widow, father, brother or sister, nor mother, which is the case before us, and which differs from the fourth section only in that it excludes the case of a surviving mother. These three clauses, therefore, form a scheme of inheritance among collaterals, embracing incidentally the case of the mother. They pursue an exclusive process, and must be read, in order to give the whole effect, as if, in addition to stating what kindred do not survive, they also stated that there were surviving those next in degree not named in the excluding clauses. As the case falls within the fifth clause, it follows from what has already been said that a distribution *per capita* is required.

The case of the sister's grand-children is perhaps less clear, but we think the district court was also correct in its ruling upon their claim. What we have already said in regard to the general policy, whereby representation exists only by ne-

cessity or in cases expressly provided, is applicable to this branch of the case. Among lineal descendants representation is expressly provided for, without limitation as to degree, the language being, "If all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to the right of representation." The sixth and seventh clauses, containing additional provisions for lineal descent, are in similar language. The language of the fifth clause is that the estate shall descend "to his next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote." By section 33, degrees of kindred are to be computed according to the civil law; so that these three plaintiffs, whom for convenience we have referred to as grand-children, stand one degree more remote than the other parties to the action. The first, sixth, and seventh clauses provide for representation among lineals of unequal degree. The fifth clause provides that those who are nearest shall be preferred to those who are more remote. The seventh canon of descent as stated by Blackstone is, "that in collateral inheritances the male stock shall be preferred to the female." (2 Blackstone, Commentaries, 234.) The term "preferred" was there used in the sense of entirely excluding the female stock provided male stock survived, and that, we think, is the general use of the term in such connection. It seems to be the policy of all the statutes at some point more or less remote to cut off representation entirely among

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collaterals, and where, because of unequal degrees of kinship, representation would otherwise be necessary, to defeat it by making a *per capita* distribution among those nearest in degree and excluding the more remote. Our law seems to reach that period where, at any point among collaterals beyond the children of brothers and sisters, the surviving kindred fall into unequal degrees. This is the construction given elsewhere to statutes resembling ours. (*Van Cleve v. Van Fossen*, 73 Mich., 342; *Schenck v. Vail*, 24 N. J. Eq., 538; *Bigelow v. Morong*, 103 Mass., 287; *Davis v. Stinson*, 53 Me., 493; *Conant v. Kent*, 130 Mass., 178.) Cases holding a different rule, so far as we have found any, have been under statutes which by their clear language required a different construction.

The judgment of the district court was in all respects correct.

JUDGMENT AFFIRMED.

GEORGE HERZOG V. JENNIE CAMPBELL.

FILED MARCH 3, 1896. No. 6253.

1. **Instructions: FAILURE TO NUMBER: REVIEW.** In order to present for review the failure of the district court to properly number instructions, exception must at the trial have been taken on that especial ground.
2. ———: **CITATIONS: HARMLESS ERROR.** While instructions should not be submitted to the jury with authorities noted thereon, still prejudice will not be presumed from the mere citation on the instruction of a volume and page of the reports. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, followed.
3. **Slander: SPECIAL DAMAGES.** Words spoken imputing an

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indictable offense are actionable *per se*, and no special damage need be proved.

4. ———: MEASURE OF DAMAGES. Evidence examined, and held sufficient to sustain a verdict for \$1,000.

ERROR from the district court of Clay county.
Tried below before HASTINGS, J.

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, contra.

IRVINE, C.

The assignments of error in this case demand no protracted discussion. The first one urged in the brief is that "the court erred in giving instructions of the plaintiff as requested, instructions not being numbered, more than one instruction being given upon the same sheet without number, and further giving the instructions as requested by the plaintiff citing authorities in the instructions." From the argument it would seem that the assignment is merely directed to the formal matters referred to; that is, to the failure to separately number the instructions and to the citation of authorities. No request to have the instructions numbered was made on the trial, and no exception was taken to the failure to number them. It is well settled that while the provisions of the statute requiring instructions to be separately numbered and marked "given" or "refused," as the case may be, are mandatory, still the failure to observe those requirements presents nothing for review, unless exception was specially taken on that ground. (*Tagg v. Miller*, 10 Neb., 442; *Fry v. Tilton*, 11 Neb., 456; *Gibson v. Sulliran*, 18 Neb., 558; *Omaha & Florence Land & Trust Co. v. Hansen*,

32 Neb., 449; *City of Chadron v. Glover*, 43 Neb., 732; *Jolly v. State*, 43 Neb., 857.)

At the end of one of the instructions appears in parentheses the following: "28 Neb., 330." This is, we presume, the citation referred to in the assignment. In *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, there was a similar complaint. The court disapproved the practice and intimated that when instructions are requested, accompanied by such notations, the court, before giving them, should erase the notations; but held that in the absence of special circumstances the error was without prejudice, and that a judgment should not be reversed for such a reason, unless prejudice be made affirmatively to appear. This case is precisely like the one cited.

The other assignments argued reduce themselves to two grounds—that the verdict was not sustained by the evidence and that the damages were excessive. The action was for slander by the defendant in error, a girl of sixteen, against the plaintiff in error, a farmer, and presumably a man who should have reached the age of discretion. The words charged imputed that the plaintiff was pregnant by reason of incestuous intercourse with her father. The answer was a general denial. Witness after witness testified to the publication of the slanderous words in substance as laid in the petition. The defendant did not directly contradict the testimony of a single witness. As to some of the witnesses he said that a portion of their testimony was true and a portion not, without saying what was true and what untrue. As to another, the question and answer were as follows: "Did you make the statement concerning Jennie Campbell as related by George

Hutton before the jury? A. No, sir; not in the shape he has given it." In other words, his testimony, by negatives pregnant, substantially corroborated the plaintiff's witnesses and confessed the charge. But it is said that the evidence rebutted the presumption of malice; and there was no evidence of express malice. We need not in this case inquire how far the rules of the common law in regard to the admission of evidence establishing and rebutting actual malice in slander cases must be modified because of our rule forbidding punitive damages. The publication of words imputing an indictable offense was here shown beyond question. No justification was attempted. No privilege was claimed. Conceding that under such circumstances the presumption of malice is a rebuttable presumption, it was not here rebutted. The defendant bases his argument on this point upon the fact which the evidence tends to establish, that each publication of the slanderous words was accompanied by a statement that the girl's father had endeavored to procure the defendant to marry her, intimating that he was responsible for her alleged condition. If this were true, which there is no evidence to show, the fact that the defendant was smarting under an unjust charge made by the plaintiff's father would be no justification or excuse for his slandering the girl. It would tend rather to prove than to disprove malice in its legal signification.

The verdict was for \$1,000, which defendant calmly argues is excessive. His counsel seem to be under the impression that proof of special damage was necessary. It is elementary that words imputing an indictable offense are actionable *per se*, and that no special damage need be proved.

 Pythian Life Association v. Preston.

(*Boldt v. Budwig*, 19 Neb., 739; *Hendrickson v. Sullivan*, 28 Neb., 329; *Barr v. Birkner*, 44 Neb., 197.) The jury had a right, and it was its duty on proof of the cause of action, to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained; and it requires some hardihood to contend that a verdict of \$1,000 for a charge of incest, repeated over and over again, against a girl just on the verge of womanhood, is more than adequate compensation.

JUDGMENT AFFIRMED.

PYTHIAN LIFE ASSOCIATION V. MARY A. PRESTON.

FILED MARCH 4, 1896. No. 6225.

Life Insurance: MEMBERSHIP FEES: AUTHORITY OF AGENT TO EXTEND CREDIT: SUBAGENTS: DELIVERY OF POLICY. A life insurance association approved an application and issued and forwarded to its general agent a policy for delivery to the applicant. The application and policy each contained a condition providing, in substance, that there should be no binding contract of insurance until the written application was received and accepted and the policy issued by the association and delivered to the proposed member in person during his lifetime and good health, nor until the admission fee and advance premium was paid thereon; that no agent of the association had authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permits, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless alteration or waiver shall be in writing and signed by the president and another officer of the association. By a contract appointing this general agent of the association, which was signed by the president and secretary thereof, his compensation for soliciting and obtaining parties to be-

47	374
53	818
55	557
55	564

47	374
50	122

come members of the association and insured therein was fixed at the whole sum of the admission fees and advanced premiums to be paid by each person insured. *Held*, That the part of the contract in relation to the compensation of the general agent gave him the right to collect of each person of whom he received an application, when he delivered the policy, the membership, or admission fees and advance premiums and keep them; that in collecting he might, at his option, demand immediate payment or extend credit, and that if he extended credit it was not for the company but for himself; that the association had surrendered the right to any further control or direction of the collection of the fees and advance premiums to be paid by persons insured through this general agent; that the contract with the general agent was inconsistent with their right to insist on the enforcement of the stipulations in regard to payment contained in the application and policy; that a delivery of the policy to the applicant, made, or caused to be made, by such general agent, was good and the contract of insurance binding, notwithstanding credit was extended for the payment of the membership fees and advance premiums.

ERROR from the district court of Douglas county. Tried below before OGDEN, J.

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

The agent had no power to waive the condition of prepayment of the premium. (*Brown v. Massachusetts Mutual Life Ins. Co.*, 59 N. H., 307; *Porter v. United States Life Ins. Co.*, 35 N. E. Rep. [Mass.], 678; *Buffum v. Fayette Mutual Fire Ins. Co.*, 85 Mass., 360; *Dircks v. German Ins. Co.*, 34 Mo. App., 31; *Greenwood v. New York Life Ins. Co.*, 27 Mo. App., 401; *Marrin v. Universal Life Ins. Co.*, 85 N. Y., 281; *Todd v. Piedmont & Arlington Life Ins. Co.*, 34 La. Ann., 67; *New York Life Ins. Co. v. Fletcher*, 117 U. S., 536; *Franklin Life Ins. Co. v. Sefton*, 53

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Ind., 387; *Morgan v. Bloomington Mutual Life Benefit Ass'n*, 32 Ill. App., 79; *Jeffries v. Life Ins. Co.*, 22 Wall. [U. S.], 47; *Ætna Life Ins. Co. v. France*, 91 U. S., 510; *Johnson v. Maine & New Brunswick Ins. Co.*, 83 Me., 183; *McGeachie v. North American Life Assurance Co.*, 14 Can. L. T., 326; *Levell v. Royal Arcanum*, 30 N. Y. Supp., 205.)

The policy and application constitute the contract. (*Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann., 662; *Chrisman v. State Ins. Co.*, 18 Pac. Rep. [Ore.], 466; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Fitzrandolph v. Mutual Relief Society*, 17 Can. S. C., 333.)

The provisions of the contract could only be waived in the manner provided by the policy. (*Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St., 64; *Kyte v. Commercial Union Assurance Co.*, 10 N. E. Rep. [Mass.], 518; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Hankins v. Rockford Ins. Co.*, 35 N. W. Rep. [Wis.], 34; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Kirkman v. Farmers Ins. Co.*, 57 N. W. Rep. [Ia.], 952; *Burlington Ins. Co. v. Campbell*, 42 Neb., 208.)

W. C. Van Gilder, also for plaintiff in error.

H. C. Brome and I. R. Andrews, contra:

We submit that with reference to the provision of the policy upon which the only defense interposed here is based it appears that the insured acted in the utmost good faith. The policy was delivered to him. He paid the admission fee and first premium, and he understood, and the insurance company knew that he understood and had been led by it to believe, that his policy was in full force and effect. Under these circumstances,

in view of the facts of the case, the provision of the policy imposing a limitation upon the authority of agents has no application. (*Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21; *Haight v. Continental Ins. Co.*, 92 N. Y., 51; *Whited v. Germania Fire Ins. Co.*, 76 N. Y., 415; *Shafer v. Phoenix Ins. Co.*, 53 Wis., 361; *American Central Ins. Co. v. McCrea*, 8 Lea [Tenn.], 513; *Story v. Hope Ins. Co.*, 37 La. Ann., 254; *Elliott v. Ashland Mutual Fire Ins. Co.*, 117 Pa. St., 548; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md., 506.)

HARRISON, J.

The defendant in error instituted this action in the district court of Douglas county against the Pythian Life Association to recover the sum of \$2,000 alleged to be due her from the life association under and by virtue of a membership certificate therein, or a policy of insurance, claimed to have been issued of date May 31, 1890, upon the life of Willet C. Preston, who was the husband of the defendant in error, and who had died since that date and prior to the commencement of this suit. The plaintiff in error, it appears, was a corporation, organized and existing under the laws of this state, engaged in the business of life insurance, with its general offices or headquarters in the city of Omaha; that on or about the 31st day of May, 1890, one David H. Caldwell, who was then its general agent, received the application of Willet C. Preston, in the city of Minneapolis, Minnesota, for membership in the association, or a policy of insurance upon his life, to be issued by it. This application was not procured by the general agent personally, but was solicited and procured by one Josiah Towne, who, Caldwell

testifies, was a special agent appointed by him, and who, it further appears, was acting and working under him and his directions and occupying the same office with him. The application was forwarded to the association at Omaha in the regular course of business and was approved, and a certificate or policy, the one upon which this suit was predicated, was issued and sent to Caldwell at Minneapolis for delivery to the insured party. The articles of agreement, under and by which David H. Caldwell was appointed agent of the association and so acted, were signed by its president and secretary, and by the appointee, and as portions of these articles may play a more or less important part in the final disposition of at least some of the vital questions to be herein decided, we deem it best to notice them here. They were as follows:

“This agreement, made this 4th day of January, 1890, between the Pythian Life Association, of Omaha, Nebraska, party of the first part, and David H. Caldwell, of Geneva, Nebraska, party of the second part,

“Witnesseth, That the party of the first part hereby appoints the said party of the second part its general agent for the purpose of procuring and effecting applications for membership in said association that will be satisfactory to said party of the first part, and of collecting membership fees on application thus effected, and for the further purpose of appointing and supervising district, special, and local agents. * * * The appointing of all subagents shall be at the sole expense of the party of the second part. The party of the first part to be in no way chargeable or responsible to the agents thus appointed for

any salary, commission, or expenses incurred by them or any of them in procuring applications or prosecuting the business of any agency created hereby or hereunder, except as hereinafter stipulated. The party of the second part to be responsible to the party of the first part for the good behavior of his subagents and for their fidelity to the interests of the party of the first part. * * *

The compensation allowed said party of the second part for his services rendered under the terms of this contract shall be 100 per cent of the membership fee or advance premium adopted by the party of the first part and collected by the party of the second part, or his subagents, if applications are written for insurance on the mortuary rate or quarterly premium-paying plans; but if written on the natural premium or endowment rate plan, with payments due semi-annually, then an additional compensation of 50 cents per \$1,000 of insurance shall be allowed to said party of the second part, to become due and payable when the first semi-annual premium is paid to and received by the said party of the first part; but if application and policy is written on the natural premium or endowment-rate plans and premiums are paid annually, then the sum of \$1 per each \$1,000 shall be allowed in addition to the membership fee, to be due and payable when the first annual premium is paid to and received by the party of the first part. * * *

The territory assigned to said party of the second part shall consist of the state of Minnesota, and such other territory as may be hereafter agreed upon."

In regard to the connection of Josiah Towne, who personally solicited and received Mr. Preston's application, with the business of the associa-

tion at Minneapolis, where it was taken, and the relation existing between Towne and Caldwell, its general agent, the latter testified as follows:

Q. Are you acquainted with Josiah Towne?

A. I am.

Q. What relation did he occupy to you while you were general agent?

A. As special agent.

Josiah Towne himself testified on this point as follows:

Q. What was your business during the months of June and July, 1890?

A. Soliciting insurance for the Pythian Life Association.

Q. With whom were you associated?

A. D. H. Caldwell.

The president of the life association says:

Q. I will ask you whether or not the defendant company had, to your knowledge, during the months of May, June, and July, 1890, an agent in Minneapolis or Minnesota, by the name of Josiah Towne?

A. No, sir; we did not.

The application for insurance contained the following statements: "It is further agreed that under no circumstances shall the certificate hereby applied for be in force until the actual payment to and acceptance of the advance dues by the association, and actual delivery of the certificate to the applicant during his lifetime and good health, with a receipt for the payment of the advance dues. It is further agreed that this application, its warranties and agreements, together with all the conditions and stipulations contained in the certificate now applied for, shall be binding on me and on any further

legal holder of the policy now applied for. I hereby agree to pay to said association, the money required to keep the certificate issued hereon in full force and effect as provided by the by-laws of said association, and I hereby adopt said by-laws and agree to be governed by them and will obey and comply with every article, its subdivisions, and its stipulations or provisions contained therein;" and on the same subject there was in the policy: "This contract is not binding until the written application therefor shall have been received, accepted, and this policy of insurance issued by the association and delivered to such member in person during his lifetime and good health, nor until the admission fee and advance premium is paid thereon. No agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permission, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless alteration or waiver shall be in writing and signed by the president and one other officer of the Pythian Life Association."

It is contended by counsel for plaintiff in error:

"First—Towne was not in any manner connected with plaintiff in error. He was not its agent or solicitor. He had never been authorized by it to do any business for it. He had absolutely no authority to make any oral agreement for credit, or any other kind of an agreement, either orally or in writing, for plaintiff in error.

"Second—Even if he had been a regular or general soliciting agent of plaintiff in error, he could not bind plaintiff in error by a delivery of the policy in question without full payment of the premium."

David H. Caldwell testified in regard to the delivery of the policy to the insured, as follows:

Q. What did you do with the policy after you received it?

A. In company with Mr. Towne, delivered it to Mr. Preston at the schoolhouse within a day or two from the time we received it.

Q. Did you receive any money at that time?

A. No, sir.

* * * * *

Q. What did you say about this policy having been delivered at the schoolhouse?

A. It was delivered within two or three days of the time received by me at the schoolhouse where Mr. Preston then worked.

Q. By whom?

A. By myself. Mr. Towne had the policy in his possession and handed it to Mr. Preston while I was with him.

Q. Left it with him?

A. No, sir.

Q. What was done with it?

A. I took it out of his hands.

Q. You took it from Mr. Preston?

A. Later.

Q. How much later?

A. Perhaps fifteen minutes.

Q. Mr. Towne had it in his possession and handed it to Mr. Preston, and then you took it back again from Mr. Preston?

A. After a time.

Q. Did you keep it in your possession after that?

A. I can't say how long; I gave it to Mr. Towne, either the same day, or very soon, to be delivered by him. The policy has not been in

my possession later than that day further than to be in that desk.

Q. Then what?

A. I think it was the same day that I gave it to Mr. Towne.

Q. The same day or about the same time after you had taken it back from Preston you gave it to Mr. Towne, did you ever see it again after that?

A. As it lay in our desk, the desk in Towne's and my office, in that vicinity.

Q. You did not have any more to do with it?

A. I did not.

Josiah Towne stated in his evidence that the policy was received at the office occupied by Caldwell and himself and within the next day or two they went to the schoolhouse in the city, where the applicant for insurance was employed as janitor, and there talked with him, and what the conversation was we will give as we find it recorded in the transcript of the testimony:

A. Went to the schoolhouse. Mr. Preston was not there; went out on the side, Twenty-third avenue I think it is; went in on the street side and went out on the avenue side. Just as we got on the sidewalk, Mr. Preston put in an appearance from his residence and met us about twenty feet from the schoolhouse. I passed the time of day and shook hands with him and says, "Tony"—always called him Tony—and took it out and delivered it to him. He says, "I can't pay for that to-day. I have just heard from the farm. I have lost a horse." He spoke something in regard to a note of \$80 or \$90 that he had got to meet; taking into consideration the fact of the note and the loss of the horse he could not take it then. He had it in his hand and during the con-

versation Mr. Caldwell took the policy from him. "Well," I says, "Tony, when could you take it?" This was some time during the middle of the week; the first or middle of the week. He says, "I will meet you at the lodge on Friday night." He says, "I will meet you at my lodge on Friday night, and I will pay you." I says, "All right, I will be there." Mr. Caldwell had the policy and we left with the understanding of the arrangement of Friday evening at his lodge. That was the conversation then and there.

Q. When did you next see Mr. Preston?

A. On Friday night by arrangement.

Q. What talk, if any, did you have with him then?

A. I went in to the lodge room and he was paying his dues and I thought it would be hardly courteous, I did not think it would, and without dunning him I went and stood right by him. He said, "Joe, I can't pay you to-night. I used more money than I expected. I am paying my dues to-night, but I will pay you at the office to-morrow morning at 10 o'clock," which would have been Saturday, the 7th. This was the 6th day of June. I said, "All right, Tony; I will be there at 10 o'clock."

Q. Where did you next see Mr. Preston?

A. At 9 o'clock the next morning at the office, or on the sidewalk first. He was waiting for me and was ahead of time.

* * * * *

Q. State what took place there.

A. Went into the office and I sat down and took the policy out of my pocket. He immediately commenced to talk that he did not, could not afford to take that policy and pay for it now.

He recited the fact of the loss of the horse and the note that was coming due and the expense he would be upon the farm; and I said to him,—you want all the conversation between him and myself,—I said to him, “Tony, you are getting to be too old a man to refuse to take any insurance. It is not a matter of accommodation; it’s a privilege that any man would insure a man of your age. You are getting old. You have been accepted, the policy is here, you are getting at that time of life you need it; your expectancy is not a great many years.” “Well,” he says, “Joe, I would rather not take it, I can’t pay for it; but,” he says, “I will pay you for all your trouble.” I says, “Tony, I want nothing if you don’t take the policy. I get no commission, but I will not take anything from you if you don’t take the policy.” I says, “You want to take it even if you don’t pay for it all now.” I says, “You are perfectly good. I had just as lief take your word as take a bond and,” I says, “you want to take it out. You need it,” and I passed it over to him. He took it in his hand, unfolded it, not way open, but just merely the face of it in that shape. “Well,” he says, “I will take it; and I will pay you \$5, and when I come down from the farm, which will be next month, I will pay you the balance.” I says, “Tony, that is all right.” He paid me \$5 and I made a memorandum of it in a book, opposite his name: “Received of Tony Preston, on June 7th, \$5.” He then handed the policy back to me. He says, “You just keep the policy for me, will you?” I says, “All right.” He wanted me to keep the policy. It would be just as safe with me as it would with him. I took and put it in an envelope

and put it in my pocket. He got up and left the office.

The policy remained in the possession of Towne until July 29, 1890, on which date it was given by him to the son of the insured, who at that time paid the balance of the amount due of the premium. The whole sum of the membership fee and advance premium we will now state was testified to be \$21.66. The policy was taken home by the son and handed to his father, who then gave it to his wife, the defendant in error. The insured had been ill for some days prior to this, and about two or three hours after turning the policy over to his wife, died. It appears that the following assessments, or calls, were sent from the main office of the association, addressed to Mr. Preston:

OMAHA, NEB., July 31, 1890.

*"Bro. Willet C. Preston, Minneapolis, Minn.: You are hereby notified that we have charged to your insurance account the amounts this day falling due in accordance with the terms of your policy Nos. 2348, 2349, and that your account now stands as follows: * * * The amount shown above to be now due to balance, \$11.62, must be received at the home office on or before August 29, 1890, in order to prevent forfeiture of your insurance. * * * Make remittances payable to the Pythian Life Association. Pay to D. H. Caldwell, R. 16, K. P. Block, Minneapolis, Minn."*

OMAHA, NEB., July 1, 1890.

*"BROTHER: Satisfactory proof of death has been submitted to the association for the following claim: * * * in consequence whereof the managing board of directors, as provided in article 9, section 2, of the by-laws of the associa-*

tion, as set forth in your policy of insurance, have ordered that a mortuary call be made upon all the members of the mortuary payment plan, of a two-thirds quarterly, mortuary premium and a 33 1-3 per cent dividend or deduction be made from the maximum quarterly premium of members insured on the national premium plan. This call is made upon all members insured prior to this date.

“Fraternally yours in F., C. & B.

“GEORGE ESMOND,

“*Acting Secretary Pythian Life Association.*”

It further appears that the defendant in error wrote to the association and requested that blank proofs of loss be sent to her; that this was done; that she procured them to be filled out and forwarded to the association; that they were received, and after they were examined a request was sent to Mrs. Preston to furnish some additional matters in the same connection, which she did.

The practical workings and benefits of insurance, both on life and property, are now universally acknowledged and adopted in countries where civilization and intelligence prevail, and people generally avail themselves of it under some of the different plans of issuance, either what is denominated the plan of the old line companies, or the mutual plan, or the lodge or association plan, etc. Whatever the plan, there is usually, if not always, issued some contract or agreement, most often styled a “policy” or “certificate of membership,” as the case may be. In some jurisdictions the forms and conditions of these are provided and prescribed by law, but in the majority are left to be agreed upon by the

insurer and insured. The insurer usually making them as numerous and as stringent as seems best calculated, or, as experience has taught, will best subserve the end desired to be attained in the conduct of the business. If the public, the customers, could be induced to pay more attention to the matter and examine the conditions and stipulations of the policies issued to them, and, where they are arbitrary or unreasonable beyond justice between the parties to the contract, demand that they be made less complicated and made consonant with a spirit of equity, or be refused or not received, no doubt the framers would soon discover a way by which they could be made safe and fair and also bear and pass the scrutiny of the public, the customers. But where it is, as it has heretofore been, the task of the legislator to pass laws to effect the purpose above sketched, or the judiciary or courts of the land to annul an unreasonable and unfair stipulation and condition when a case involving the validity is presented for adjudication, it was, and is, naught but a mere trial of the skill and ingenuity of the draughtsmen of the policies to frame new conditions to evade the laws enacted by the legislatures, or to fill the place of such as are declared void or robbed of their effect by the courts. Contracts of insurance occupy no different position in the eyes of the law than do any other agreements, and when not unconscionable and unfair, should be enforced as made between the parties. The stipulation in the contract sued upon in the case at bar, that it should not be binding unless the membership fee and what was styled "the advance premium" were paid and the policy actually delivered to the person whose life was to be

insured thereby during life and good health, and the condition that no agent had authority to extend credit, were neither of them unjust or unfair or incapable of enforcement, nor such as should not be enforced in exact conformity with the letter and spirit. The association, it appears, had appointed a general agent, and the agreement which gave his appointment effect, assigned or in effect made his, as his compensation for what business he might do for it, all membership fees and advance premiums, and apparently without any further regard for how he received them or when, or what arrangements he might make as to their payment, whether he exacted it as contemplated by the terms of the policy or extended credit, as it is claimed he did in this particular instance. Our belief that the arrangement with the general agent should be thus construed is much strengthened by the facts that Preston had been considered by the association as one of its members, and it had recognized him in that relationship, by notifying him to contribute dues and premiums and mailed him a notice of a mortuary call. Clearly it would be violative of the principles of justice and right to hold that an arrangement might exist between the association and its agent by which the membership fees and advance premiums to be paid by an applicant for insurance became the property of the agent, and the association was no further interested in them, or their payment, had no further control over them, and whether payment was exacted on delivery of the policy, credit was extended, or payment was entirely waived, could in no manner affect the association or its rights or funds, and say that if the agent extended credit or made the applicant a

present of the membership fees and advance premiums, and the party to whom a policy had been delivered under such circumstances, died, that the policy was not in force. While it is very evident that, under the terms of the application and policy, no credit could be extended for the association, or rather it was the intention that none should be, it is equally clear that by their agreement it had no further power or control over the membership fees or advance premiums, and could make no objections to credit being extended by the general agent. The contract which the association entered into with him, by which he became entitled to the whole amount of such fees and premiums, was inconsistent with the stipulations contained in the application and policy, in regard to the payment of the fees and advance premiums, or their enforcement as against a party to whom their general agent had granted time for their payment. The policy was prepared and forwarded to the general agent by the association to be delivered and he to receive payment of fees and premiums of which no part belonged to the association, but to the general agent. If delivered, it was in full force, without regard to any arrangement made between the agent and the party insured respecting the time of payment of the advance premium. (*Smith v. Provident Savings Life Assurance Society of New York*, 65 Fed. Rep., 765, and cases cited.) The facts of the case referred to were somewhat different from the facts in the case at bar, but the principle of law applicable and decisive the same, and equally applicable and controlling in the present case.

In regard to the contention that Towne was not an agent of the association, in no manner

connected with it or its business and could not bind it by delivering a policy to the applicant, or by any agreement to extend credit, the general agent testified that Towne was a special agent for the association, appointed by him (the general agent) by virtue of the authority conferred upon him by his contract with the association, by which it will be remembered he was empowered to appoint special agents, but however this may have been, there was ample evidence to show that Towne was soliciting business for the association, working with and under the orders and directions of the general agent, and whether he was recognized by the association as an agent, or in its service, or its officers had any knowledge of his work, or his existence, is immaterial. The policy in question was forwarded to the general agent for the delivery. He turned it over to Towne, who had solicited and received the application, and directed him to deliver it to the party for whom by its terms, it was intended, and Towne followed the directions, and as appears from the testimony, gave it to Willet C. Preston, who left it with Towne for safe-keeping, and if the arrangement in respect to extension of credit for the payment of a portion of the amount due as fees and advance premiums, effected at the time of such delivery, was satisfactory to Caldwell, the general agent to whom the moneys to be paid belonged, and it is a fair inference that it was, no one could complain and certainly not the association, for, as we have seen, it had no interest in the fees or premiums to be paid at that time, or how they were paid, or when. We must conclude from a full investigation of the testimony that it sustains a finding of the delivery of

the policy sued upon in this action and in such a manner and at such a time as constitute it a valid, subsisting, and binding contract between the party applicant, and thereby insured, and the association. What occurred between Towne and Preston at the time the policy was given by Towne to Preston, considered with all the other facts and circumstances shown by the evidence and which were necessarily incident to and had a direct bearing upon this part of the transaction, constituted in legal effect a delivery of the policy.

There is an assignment of error which reads as follows: "The court erred in giving the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth instructions given by the court on its own motion, to which the plaintiff excepted." Instruction numbered 11, given by the court on its own motion, was without fault, also some of the others enumerated in this assignment. The assignment was as to all the instructions, and having determined that it is not well taken in respect to one or more, in accordance with a well established rule of this court, it must be overruled as to all.

It is further assigned as error: "The court erred in refusing to give the first and second instructions asked by the plaintiff in error, to which refusal plaintiff in error duly excepted." No. 2 of the instructions referred to in this assignment, in some of the statements contained therein, would have incorrectly informed the jury, and the refusal to give was therefore proper. The error assigned was of the refusal to give the two instructions, and it being determined that the action of the court as to either of them was without error, it disposes of the entire assignment.

This disposes of all the errors which were urged in the argument, and it follows from the views herein expressed and the conclusions reached that the judgment of the district court must be

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. J. J.
KINNEY ET AL.

FILED MARCH 4, 1896. No. 6335.

1. **Bill of Exceptions: AUTHENTICATION.** If a bill of exceptions has not been authenticated by the certificate of the clerk of the trial court as required by law, matters contained therein will not be considered or examined by this court.
2. **Review.** Errors must be affirmatively shown by the record; if not, it will be presumed that the proceedings of the trial court were correct.

ERROR from the district court of Kimball county. Tried below before NEVILLE, J.

John M. Thurston, W. R. Kelly, and E. P. Smith,
for plaintiff in error.

H. D. Rhea, contra.

HARRISON, J.

In this action, in the district court of Kimball county, the plaintiffs (defendants in error) sought to recover of the Union Pacific Railway Company, as damages, the value of a gray stallion, alleged to have been struck and killed by a locomotive, on a portion of the company's line of road in Kimball county, Nebraska, it being further alleged

47	393
47	398
47	393
50	328
53	569
54	417
54	499
54	506
55	149
55	670

47	393
159	302

that the striking and killing of the horse were due to the negligent and careless manner in which an engine and train of cars were operated and handled by the employes of the company at the time of the occurrence. Issues were joined by the pleadings filed by the parties, and a trial resulted in a judgment in favor of the plaintiffs in the action. The company presents the case here for review by error proceedings. In view of the disposition which we have, after examination, determined must be made of the case, a further or more extended statement is deemed unnecessary. In the argument in the brief filed by counsel for the railway company it is urged:

"1. The court should have granted defendant's request to direct a verdict for defendant (record, p. 12), or its motion for new trial (record, p. 16).

"2. The fifth paragraph of the petition declares 'where the killing of said stallion occurred was in the county of Kimball and in the state of Nebraska, and at a point about one and one-half miles west of Kimball in the said county and state; and at said point there is a public highway running along said railroad track, and said defendant has carelessly, negligently, and knowingly, utterly failed to construct a fence along said railroad, or in any manner protect stock from straying upon said track.' (Record, p. 3.) The evidence, as will be seen by referring to the preceding abstract and bill of exceptions, conclusively establishes that a fence had been erected by the plaintiff Kinney on the south side of defendant's right of way and the public highway running along said railroad track upon the south, said highway partially on defendant's right of way, leaving it between the fence and the road.

"3. The court erred in that by the third instruction it charged the jury that: 'The building of a fence on one side of a railway company's right of way by the owner and occupier of the lands on that side, does not release the company from its duty to build a fence on the other side of said railway company's right of way. (Record, p. 9.)

"4. The uncontroverted evidence shows that the plaintiff Kinney, in permitting his stallion to run at large, was guilty of a breach of section 91 of the Revised Statutes (Cobbey's edition).

"5. The court erred in overruling the objection of the defendant below to the several questions put by the plaintiff on rebuttal to L. C. Kinney, Charles E. Cronn, and J. J. Kinney, as follows."

To properly determine the force of each of these questions raised by the assignments of error a reference to and examination of the testimony introduced during the trial of the case, or portions of it, are necessary. Attached to the transcript is what purports to be a bill of exceptions and to contain the evidence, but it is not authenticated by the certificate of the clerk of the trial court as required by law, and cannot be used for any purpose. Such a certificate is indispensably necessary. (*Wax v. State*, 43 Neb., 18, and cases cited.) In the opinion of the case of *Romberg v. Fokken*, 47 Neb., 198, written by NORVAL, J., it was said: "That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court, nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause, or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any

purpose. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518.) But it may be said the omission of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions, by raising no objections thereto in this court. *Yates v. Kinney*, 23 Neb., 648, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction this court reviews the proceedings of the district court, and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer. If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment, or order sought to be reviewed, and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. (*Moore v. Waterman*, 40 Neb., 498; *Otis v. Butters*, 46 Neb., 492; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402.)" (See, also, *First National Bank of Greenwood v. Cass County*, 47 Neb., 172.)

As the decisions of the questions raised by the assignments of error and discussed in the brief or argument of counsel for plaintiff in error necessitate an inspection of the evidence adduced and we have just decided the testimony in this case is not

before us, and as alleged errors must be shown by the record or be presumed not to have occurred (*Willis v. State*, 27 Neb., 98; *Romberg v. Hediger*, 47 Neb., 201), it follows that the assignments of error must be overruled and the judgment of the trial court

AFFIRMED.

WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY V. WILLIAM GERHOLD.

FILED MARCH 4, 1896. No. 6149.

1. **Bill of Exceptions: AUTHENTICATION.** A bill of exceptions in a cause tried in the district court must be filed with the clerk of that court, and if the original bill is to be used in the supreme court, it must be authenticated by the certificate of the clerk of the trial court.
2. **Review: ASSIGNMENTS OF ERROR.** Assignments of a petition in error which can be reviewed only in connection with a bill of exceptions will be disregarded where no authentic bill is contained in the record.
3. **———: AFFIRMANCE.** The petition in error presenting no question of law or fact for review, the judgment is affirmed.

ERROR from the district court of Platte county.
Tried below before SULLIVAN, J.

McAllister & Cornelius, for plaintiff in error.

C. J. Garlow, contra.

NORVAL, J.

This suit was upon a promissory note executed by the defendant in error as part consideration for one of plaintiff's harvesting machines.

47	397
47	588
47	397
50	186
50	310
51	228
51	808
52	287
54	499
54	633
55	149

47	397
61	584

The defense interposed was breach of warranty of the machine. From a verdict and judgment thereon in favor of the defendant the plaintiff prosecutes error.

There is attached to the transcript a document purporting to be the bill of exceptions in the case, but it does not appear to have ever been filed with, nor is it in any manner authenticated by, the clerk of the district court; hence it must be disregarded by us. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518; *Wax v. State*, 43 Neb., 18; *Romberg v. Fokken*, 47 Neb., 198; *Union P. R. Co. v. Kinney*, 47 Neb., 393.)

The petition in error contained six assignments, but two of which—the verdict is contrary to the evidence, errors in the admission of testimony—are argued in the brief. The other assignments are deemed waived. (*Glaze v. Parcel*, 40 Neb., 732; *Erck v. Omaha Nat. Bank*, 43 Neb., 613; *City of Kearney v. Smith*, 47 Neb., 408.) Neither of the assignments discussed in the brief can be reviewed, except in connection with a bill of exceptions preserving the evidence adduced, and the rulings of the court below during the trial. As there is no authentic bill of exceptions in this record, the assignment of errors must be overruled and the judgment affirmed. (*State Ins. Co. v. Buckstaff*, 47 Neb., 1; *Sweeney v. Ramge*, 46 Neb., 919.)

AFFIRMED.

RUTHIE BROWN ET AL., APPELLEES, V. SAM
WESTERFIELD ET AL., APPELLANTS.

FILED MARCH 4, 1896. No. 6136.

47	399
51	44
51	718
55	24
55	584
47	399
57	344

1. **Quieting Title: DELIVERY OF DEED: PLEADING.** An allegation in a pleading that the grantor "made and executed" a deed, includes all acts essential to the completion of the muniment of title,—the delivery of the instrument to the grantee as well as the signature of the grantor.
2. **Lost Deeds: TITLE.** The loss or destruction of a deed, after delivery thereof, does not divest the title of the grantee.
3. **Deeds: DELIVERY.** The delivery of a deed is essential to render the conveyance operative.
4. ———: ———: **EVIDENCE.** Delivery is purely a question of intent to be determined by the facts and circumstances of each particular case.
5. ———: ———. It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient, if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument.
6. ———: ———. A mother signed and acknowledged a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivered the deed to the justice for the use and benefit of the grantee, without any reservation of control, with the intention and understanding that the justice should retain the custody of the instrument until the grantor's death, when he was to file it for record. The mother subsequently told the daughter that the property belonged to the latter, and that it had been fixed so she would have a home. *Held*, That the delivery to the justice was sufficient to pass the title to the property to the grantee at the date of such delivery.

APPEAL from the district court of Lancaster county. Heard below before TUTTLE, J.

See opinion for statement of the case.

Pound & Burr, for appellants:

The petition merely alleges that the deed was made and executed, without any allegation of delivery. The proof also fails to show delivery of the deed. The plaintiff has no title to the lot except as one of the heirs of Hannah Brown. (*Patrick v. McCormick*, 10 Neb., 1; *Wier v. Batdorf*, 24 Neb., 83; *Jones v. Loveless*, 99 Ind., 317; *Miller v. Physick*, 24 Ark., 244; *Miller v. Lullman*, 81 Mo., 311; *Byars v. Spencer*, 101 Ill., 429.)

A deed intended to operate as a testamentary disposition is in effect a will and is ambulatory and revokable during the life of the grantor. (*Turner v. Scott*, 51 Pa. St., 126; *Hall v. Bragg*, 28 Ga., 330; *Carey v. Dennis*, 13 Md., 1; *Frederick's Appeal*, 52 Pa. St., 338.)

Where a will once known to exist and to have been in the custody of the testator cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it. (*Behrens v. Behrens*, 47 O. St., 323; *Minor v. Guthrie*, 4 S. W. Rep. [Ky.], 179.)

Roscoe Pound and *Burr & Burr*, also for appellants:

To constitute delivery the grantor must unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property. It must be shown to have been intended as a present, operative conveyance. (*Fisher v. Hall*, 41 N. Y., 416; *Barrows v. Barrows*, 138 Ill., 649; *Davis v. Ellis*, 39 W. Va., 226; *Cline v. Jones*, 111 Ill., 563; *Schuffert v. Grote*, 88 Mich., 650; *Taft v. Taft*, 59 Mich., 185.)

Possession of the deed by the person employed to draw it is no delivery. (*Healy v. Seward*, 5 Wash., 319.)

B. F. Johnson and T. F. Barnes, contra.

References to the question of intention as to delivery and how determined: *Jordan v. Davis*, 108 Ill., 336; *Warren v. Swett*, 31 N. H., 332; *Burkholder v. Casad*, 47 Ind., 418; *Stevens v. Hatch*, 6 Minn., 19; *Black v. Kuhlman*, 33 O. St., 203; *Mitchell v. Ryan*, 3 O. St., 377; *Jamison v. Craven*, 4 Del. Ch., 311; *Adams v. Ryan*, 61 Ia., 733.

References as to delivery to another to hold for grantee's use: *Eckman v. Eckman*, 55 Pa. St., 269; *Jones v. Swayze*, 42 N. J. Law, 279; *Fewell v. Keisler*, 30 Ind., 195.

Absolute delivery to a third person to hold until grantee's death is a good delivery and passes title presently. (*Hinson v. Bailey*, 73 Ia., 544; *Albright v. Albright*, 70 Wis., 528.)

Acceptation is presumed in favor of infants. (*Byington v. Moore*, 62 Ia., 470; *Palmer v. Palmer*, 62 Ia., 204.)

A deed once delivered cannot be revoked by redelivery. (*Bunz v. Cornelius*, 19 Neb., 107; *Rogers v. Rogers*, 53 Wis., 36.)

NORVAL, J.

This was a suit by Ruthie Brown against Sam Westerfield and Ida Westerfield, his wife, and Louis and Jimmie Brown, to quiet the title in plaintiff to the south half of lot C, a subdivision of lots 4, 5, and 6, in block 28, of Kinney's O Street Addition to the city of Lincoln. The petition alleges that plaintiff is the only living child of Hannah and James Brown; that on the 20th day of June, 1883, the said Hannah Brown, now deceased, being the owner in fee-simple of the real estate above described, together with her hus-

band, said James Brown, made and executed a warranty deed to the plaintiff of said property, reserving a life estate therein to said James Brown; that said deed has become lost or stolen,—plaintiff is unable to state which,—but is informed that the same was placed in the hands of Sam Westerfield, one of the defendants; that though demand for the same has been made upon him, he has refused to comply therewith, and disclaims all knowledge of the deed; and that the defendants Sam Westerfield, Jimmie and Louis Brown are not the issue of the said James and Hannah Brown, but are children of said Hannah Brown by a former husband. James Brown, plaintiff's father, was subsequent to the institution of the suit joined as party plaintiff, and no service of summons having been had upon Louis and Jimmie Brown, the action was dismissed as to them. Sam Westerfield answered, admitting that plaintiff is the child and one of the heirs at law of said Hannah Brown, and denying all other averments of the petition. By way of cross-petition, Westerfield sets up that Hannah Brown and her husband, James Brown, executed and delivered a mortgage upon said lot C to one Mary Jane Carman to secure the payment of \$27 and interest; that the defendant is the owner of said mortgage, and that the debt for which the same was given to secure has not been paid, nor any part thereof. The answer prays for the dismissal of plaintiff's suit, and for foreclosure of said mortgage. Upon the hearing, a decree was entered quieting the title to the premises in controversy in Ruthie Brown, subject to the life interest therein of her father, and foreclosing said mortgage. From the decree quieting the title the Westerfields appeal.

The appellants contend, in argument, that the petition is defective and fails to state a cause of action, in that it contains no specific allegation that the deed in question was ever delivered. The delivery of a deed is indispensable to its validity. While it is true there is no direct averment in the pleading that the deed had been delivered, yet this is not fatal. It is averred that the grantors "made and executed a warranty deed to the plaintiff" to the property. "Execute" is defined by Webster thus: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing and perhaps sealing and delivering; as, to execute a deed, lease, mortgage, will," etc.; and the same authority gives the following as one of the definitions of the word "execution:" "The act of signing, sealing, and delivering a legal instrument, or giving it the forms required to render it valid; as the execution of a deed." In 1 Warvelle, Vendors, p. 482, it is said: "The term 'execution' primarily means the accomplishment of a thing—the completion of an act or instrument; and in this sense it is used in conveyancing to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument, which are: the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee." In this state the seal of the grantor is unnecessary, and an acknowledgment is no part of the deed conveying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title. The averment in the petition that the grantors "made and executed"

the deed, under the definitions already given, includes the delivery of the instrument as a conveyance of the property.

The uncontradicted testimony shows that James and Hannah Brown signed and acknowledged a deed of conveyance to their daughter, Ruthie Brown, one of the plaintiffs herein, for the premises in controversy, reserving a life estate therein to James Brown, one of the grantors. It was never actually delivered to the grantee in person, nor was it ever placed upon record. The instrument is not now to be found. A deed is merely the evidence of the grantee's title. The loss or destruction of the deed did not divest plaintiffs of their title, if they ever acquired one. And whether the title ever passed from Mrs. Brown, the owner of the fee to this property, depends upon whether the facts disclosed by this record amount, in law, to a delivery of the deed in question. It appears from the evidence adduced that Hannah Brown, being the owner of the property in dispute and another tract of the same size adjoining it on the north, on the 20th day of June, 1883, caused two deeds to be prepared by J. H. Brown, a justice of the peace of the city of Lincoln, one covering the north portion to Sam Westerfield, one of the defendants, and the other covering the south tract to Ruthie Brown, subject to a life interest in her father, James Brown. These deeds, properly witnessed, were signed and acknowledged by both Hannah and James Brown before said justice of the peace. The magistrate is the only person who testified as to what transpired at the time, and the disposition made of the deeds. He states, in substance, that he had acted as Mrs. Brown's legal adviser, having at various

Brown v. Westerfield.

times transacted considerable business for her; that on the date already mentioned, at her request, he went to see her, when she informed him it was her desire that the property be divided between her two children, Ruthie and Sam, the former being then some nine or ten years old, reserving a life interest in her husband in the home property; that her two sons, Jimmie and Louis, had abandoned her, and it was her wish to make a division of the property then for fear they would come in for a share at her death. In pursuance of this request, the two deeds were prepared by the witness, and then signed and acknowledged. The magistrate was requested to keep them and place them upon record after her death. He carried them for two or three days thereafter, when he went to Mrs. Brown's place of abode, put them in a tin box in which she kept her tax receipts and other papers, and at the time the witness, at Mrs. Brown's request, promised to see to the recording of the deed in question upon her death; that four or five times thereafter, the last one being about a week or ten days before Mrs. Brown died, she talked the matter over, expressing herself satisfied with the disposition she had made of the property; that immediately after the death of Mrs. Brown, the justice, with James Brown, looked for the deed, and then discovered that it was gone. Sam Westerfield testified that he had never seen the deed, but had heard it spoken of by several; and that the deed to himself he had recorded August 28, 1883, prior to his mother's death. Ruthie Brown testified that about a week before her mother died, the latter told her, as she had frequently stated before, that the place was Ruthie's and it had been fixed so that she would

have a home; that about two weeks before the trial witness asked Sam Westerfield about the deed, and he replied that he had it, or knew where it was. This conversation Westerfield denies having ever occurred.

The matter of contest is whether there was in law a delivery of the deed, for a delivery is indispensable to its binding effect. But, as was said by Chief Justice LAKE in *Brittain v. Work*, 13 Neb., 347: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case. In the case at bar it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title to take effect presently. In other words, did Mrs. Brown part with control over the instrument and place the title in her daughter? If such was the purpose, the delivery was complete, and the title to the property passed. (1 Devlin, Deeds, secs. 260-262; *Warren v. Swett*, 31 N. H., 332; *Jordan v. Davis*, 108 Ill., 336; *Burkholder v. Casad*, 47 Ind., 418; *Masterson v. Cheek*, 23 Ill., 73.) From an examination of the evidence we are satisfied that it establishes a delivery of the deed. It was placed in the hands of the magistrate who took the acknowledgment to hold for the grantee. This was sufficient to carry the title to the land. (*Byington v. Moore*, 62 Ia., 470; *Hinson v. Bailey*, 73 Ia., 544; *Black v. Hoyt*, 33 O. St., 203; *Lessee of Mitchell v. Ryan*, 3 O. St., 377; *Albright v. Albright*, 70 Wis., 528; *Ball v. Foreman*, 37 O. St., 132.)

In the case last cited the grantor delivered the deed to a third party with the understanding that he should retain the custody of the same until the grantor's death, when he was to deliver to the grantee. It was held to be the grantee's deed *in præsenti*, and that the subsequent destruction of the instrument by the grantor did not have the effect to divest the title of the grantee. Cassody, J., in delivering the opinion of the court in that case cites numerous authorities which sustain the proposition enunciated in the case. In *Hinson v. Bailey*, 73 Ia., 544, Eva Hinson went to a justice of the peace and signed and acknowledged a deed before him conveying certain lands to her children. She left the deed in the possession of the magistrate, with directions to retain it until her death, and then have it recorded. The justice told her that she could have the deed whenever she desired it, but she replied: "I don't want it. You must keep it until I die." It was held to be a good delivery and that the deed took effect immediately upon the delivery to the justice. (See, also, *Wittenbrock v. Cass*, 42 Pac. Rep. [Cal.], 300; *Bury v. Young*, 1 Am. L. Reg. & Rev., n. s. [Cal.], 140.) It is true in the case before us that, after the delivery of the deed to Justice Brown, he took it to the grantor and put it in a box where she kept her papers; but it was not with the intention of surrendering the deed, nor did that fact have the effect to divest the title of the grantee. Having once passed, it could not be divested in that way. (*Bunz v. Cornelius*, 19 Neb., 107; *Connell v. Galligher*, 39 Neb., 793.)

It is argued by appellants that the conveyance was intended to operate in the nature of a testamentary disposition of the property, not to take

effect until the death of Mrs. Brown, and authorities are cited in the brief to the effect that such a deed is invalid. The facts do not warrant such conclusion. The intention clearly was that the deed should take effect at once. The recording alone was to be deferred until Mrs. Brown's death. This is not a case where a grantor has placed a deed in a depository to be delivered to the grantee upon the death of the grantor, reserving the right to recall the deed at any time. The authorities cited by counsel for appellants are, therefore, not applicable here. We are constrained to hold that the trial court was, under the circumstances, justified in finding a sufficient delivery of the deed. The decree is

AFFIRMED.

CITY OF KEARNEY V. LOUISA SMITH.

FILED MARCH 4, 1896. No. 6342.

1. **Review: ASSIGNMENTS OF ERROR.** Assignments of error relating to the giving and refusal of instructions cannot be considered unless the record discloses that exceptions were taken at the trial.
2. ———: ———: **WAIVER.** Assignments of error not presented by the briefs or oral argument, will be treated as waived.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

W. D. Oldham, for plaintiff in error.

F. G. Hamer and J. S. Murphy, contra.

47	408
47	398
47	408
51	228

IRVINE, C.

The defendant in error recovered a judgment of \$450 against the plaintiff in error, for injuries sustained by reason of a fall alleged to have been caused by a defective sidewalk. The city seeks to reverse this judgment.

The first, second, third, and fourth assignments of error relate to the giving and refusal of instructions; but as the record does not disclose that any exceptions were taken to either the giving or refusal of instructions, these assignments are not open to examination. The only other assignment is that the damages were excessive. Neither by oral argument nor by brief was this assignment called to the attention of the court, and it is therefore treated as waived. Even were it not waived, we could not consider it, because there is no certificate of the clerk of the court authenticating what is filed here as either the original or a copy of the bill of exceptions filed in the case.

JUDGMENT AFFIRMED.

CARTER WHITE LEAD COMPANY V. PETER KINLIN.

FILED MARCH 4, 1896. No. 6287.

47	409
52	437
47	409
58	12
47	409
59	206

- 1. Instructions: FAILURE TO REQUEST: REVIEW.** In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics.
- 2. Contract of Employment: DAMAGES: STATUTE OF FRAUDS.** A contract whereby one, in consideration of the release of a claim for damages against him, agrees to employ

Carter White Lead Co. v. Kinlin.

the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void either for uncertainty, for want of mutuality, or as within the statute of frauds.

3. **Statute of Frauds: TIME TO PERFORM CONTRACT.** A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year.
4. **Contract of Employment: TIME: OPTION TO TERMINATE.** One party to a contract may obligate himself for a definite or an indefinite period, not depending on his own acts, and the other party may at the same time have the option of terminating it at his will. A contract upon sufficient consideration is not void for that reason.
5. ———: **CONSIDERATION: DAMAGES.** In order to sustain a contract which has for its consideration the release of a claim for damages against the promisor it is not necessary that the claim should be one which on litigation would have proved valid.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated by the commissioner.

E. J. Cornish and *W. T. Nelson*, for plaintiff in error:

In instructing the jury the court erred in omitting essential elements of the case. (*Hale v. Sheehan*, 36 Neb., 439; *City of Plattsmouth v. Boeck*, 32 Neb., 297; *City of York v. Spellman*, 19 Neb., 385; *Nelson v. Johansen*, 18 Neb., 183; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaid*, 26 Neb., 635; *Runge v. Brown*, 23 Neb., 817.)

The contract is void for want of mutuality. (*Stiles v. McClellan*, 6 Colo., 89; *Townsend v. Fisher*, 2 Hilton [N. Y.], 47; *Evins v. Gordon*, 49 N. H., 444; *Boyce v. Berger*, 11 Neb., 399; *Pennsylvania Co. v. Dolan*, 32 N. E. Rep. [Ind.], 802.)

Smith & Sheean, contra:

If any instruction is vague or indefinite, plaintiff in error waived the right to object thereto by failing to request a more specific charge. (*Klosterman v. Olcott*, 25 Neb., 383; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 425; *Dunbar v. Briggs*, 13 Neb., 332.)

The contract relied on is a legal one and binding on both parties. (*Hobbs v. Brush Electric Light Co.*, 75 Mich., 550; *Pennsylvania Co. v. Dolan*, 6 Ind. App., 109.)

IRVINE, C.

The assignments of error relied on by the plaintiff in error relate to the giving of instructions and to the sufficiency of the evidence. It is not contended that any of the instructions misstated the law, but the complaint is that they omitted certain features of the case upon which the jury should have been instructed, both in stating the issues and the law applicable thereto. For the most part these assignments clearly fall within the rule that a failure to fully instruct the jury upon the issues and law of the case is not open to review, unless the party complaining requested instructions on the omitted topics. (*Barr v. City of Omaha*, 42 Neb., 341; *Carleton v. State*, 43 Neb., 373; *Post v. Garrow*, 18 Neb., 682.) It is, however, claimed that by two instructions the court endeavored to cover all the facts essential to a recovery; and that omissions of essential facts in these instructions rendered them erroneous, without such request. We do not think that the instructions referred to severally or jointly were of the char-

acter which renders that rule applicable. The action was by Kinlin against the Carter White Lead Company, which we shall hereafter term the "company," the petition alleging that on the 23d of November, 1891, a contract had been made between the parties whereby the company agreed to employ plaintiff, and pay him \$2.50 per day while working in the smelting department, and \$2 per day while elsewhere employed, and to so give him employment as long as the works were kept running, or until the plaintiff saw fit to quit, in consideration whereof Kinlin agreed to so work for the company, and to release a claim for damages against the company, which was then in litigation between them. Kinlin, in the first count of his petition, alleged that he had been wrongfully discharged, in violation of such contract, and prayed damages therefor. In another count he alleged that the company had not paid him as much as it had agreed during the time he was employed, and judgment was sought for the deficiency. The answer, among other things, denied the material allegations of the petition, alleging that Kinlin's employment had been a hiring at will at the wages paid other men for similar work. The instructions particularly complained of were as follows:

"5. Before the plaintiff can recover he must prove by a preponderance or greater weight of the testimony that the contract alleged was made, that he and the defendant by its president, Carter, did agree that defendant would give plaintiff employment as long as defendant's works were kept running, at the rate of \$2.50 per day for work in the smelting department and \$2 per day while otherwise employed."

"9. If you believe from a preponderance of the evidence that the contract alleged by plaintiff was made, and that defendant was discharged without adequate and reasonable cause, then he would be entitled to recover for the time he was unable to procure work as shown by the evidence. If he could procure work it would be his duty to accept work, and for the time he was able to get work, with reasonable diligence, he could not recover. For such time as he could not, with reasonable diligence, get work, and was obliged to be idle, he would be entitled to recover at the agreed rate. The amount of plaintiff's claim under this cause of action is \$180."

As we said, the complaint is that these instructions were not complete. The fifth instruction related solely to the promise on which Kinlin founded his claim, impressing upon the jury that, in order to recover, Kinlin must establish the contract as alleged. The object of the ninth instruction was to state the measure of damages, and especially the law of avoidable consequences. Standing alone, we do not see that either or both could be taken as summarizing all the particular elements essential to a recovery; and taken in connection with the other instructions, each one of which related to a particular issue, it is quite clear that the jury could not have understood them in that sense; so that the first rule stated is applicable to these instructions as well as to the others.

The assignment that the verdict is not sustained by the evidence suggests questions both of law and of fact. So far as the question of fact is concerned, the case is one of those in which counsel very reasonably believe that they have suffered

an adverse verdict while the evidence preponderated in their favor, and therefore seek in this court a modification of the rule generally observed in ascertaining the sufficiency of the evidence, in order to correct a verdict which they feel to be wrong. The wisdom of the rule here established by which this court declines to weigh conflicting evidence in cases within its appellate jurisdiction is daily justified by experience. On the written transcript, it seems to the writer that the verdict was against the weight of the evidence; but the opportunities of the jury on the trial and the district judge on the motion for a new trial, for correctly estimating the effect of the evidence, were much better than ours. There is sufficient conflict to prevent our disturbing the verdict, unless as a matter of law the contract, which the evidence, taken most favorably for the plaintiff, tends to establish, is invalid or incapable of enforcement. It is quite evident from the testimony and the instructions that the verdict rendered for \$120.07 was based entirely on the first count in the petition—that for the wrongful discharge of plaintiff. The defendant claims that the contract sued on was invalid, and that, therefore, the judgment cannot stand. A similar contention was urged in regard to a somewhat similar contract in *Chicago, B. & Q. R. Co. v. Cochran*, 42 Neb., 531; but the case was disposed of on grounds which did not call for a decision of the questions here presented. In *Hobbs v. Brush Electric Light Co.*, 75 Mich., 550, the plaintiff released a claim for damages against the defendant in consideration of defendant's promise to give the plaintiff "steady employment as trimmer." The court held this to be a valid and binding contract,

although it will be observed that it was less definite in its terms than that alleged by Kinlin. In *Pennsylvania Co. v. Dolan*, 6 Ind., App., 109, the contract was to give Dolan "steady and permanent employment," at the amount he was earning at the time of his injury, in consideration whereof Dolan released the company from liability on account of such injuries. The court pronounced this contract valid because of the consideration, saying that the words "steady and permanent" were equivalent in meaning to the promise of employment so long as the employe was able, ready, and willing to perform such services as the company might have for him to perform. The construction given these terms was not very different from the actual terms of the contract relied on in this case. Here the duration of the contract was limited either by Kinlin's volition or by the company's continuing to operate its works. We think these cases show that the contract was not void for uncertainty. In the Indiana case it is intimated that it might be within the statute of frauds and therefore only enforceable for one year. A contract, within the meaning of the statute, which is not to be performed within one year from its date, means a contract which by its terms discloses that the parties do not contemplate that it can be performed within that period; as, for instance, a contract to employ a party for one year beginning at a future day. (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121.) Where a contract is of such a character that it may be performed within a year, it is not within the statute merely because it may not be performed within that time. (*Connolly v. Giddings*, 24 Neb., 131; *Kiene v. Shaeffing*, 33 Neb., 21; *Powder River Live*

Stock Co. v. Lamb, 38 Neb., 339.) In this case the company might close its works for an indefinite period within a year; or within that time Kinlin might see fit to quit. In either event the contract would be performed.

Finally, it is claimed that the contract was void for want of mutuality. This argument is based on the contention that in order to be mutual the plaintiff must have been bound to continue work as well as the defendant to employ him; and secondly, upon the ground that it was not shown that plaintiff had a valid claim for damages and that it was not shown that the contract was in consideration of the release of such claim. On the first point, we do not think that a contract lacks mutuality merely because every obligation of the one party is not met by an equivalent counter-obligation of the other. If the consideration existed the company might well bind itself to furnish the plaintiff employment for a definite period or an indefinite period, not depending on its own acts, and at the same time give the plaintiff the option of releasing it from that obligation by an earlier determination, if he so desired. On the second point we think there was some evidence, and sufficient to justify the finding, that the release of the claim for damages was the moving consideration of the contract. It was not necessary that plaintiff should establish a valid claim. Indeed, if his claim had been absolutely unquestioned for an amount certain, his release for a less amount might not bind him. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463.) But a party may buy his peace, and when an action is brought against one who compromises it by the payment of money, he cannot recover the money back on

State v. Roper.

the ground that had the litigation been pursued the plaintiff would have failed in his case. This is elementary; and if it is true, then it follows that a contract for the compromise of such litigation may be enforced.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL,
V. GEORGE W. ROPER ET AL.

47	417
50	629
51	805
47	417
59	709
159	710

FILED MARCH 5, 1896. No. 7387.

1. **Counties: RELOCATION OF COUNTY SEAT: ELECTIONS: BALLOTS.** Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because in the certified return of the county election board such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank ballots."
2. ———: ———: ———: ———. Where there were cast upon the question of relocation of the county seat of Red Willow county 867 votes for Indianola, and for McCook 1,339 votes, and the return of county canvassers showed ballots to have been rejected or not to have been voted or accounted for, *held*, that McCook, having received more than three-fifths of the numbers above given, became the county seat of said county. *State v. Roper*, 46 Neb., 724, is overruled.

REHEARING of case reported in 46 Neb., 724, on application for *mandamus* to compel the officers of Red Willow county to remove their offices from Indianola to McCook. *Writ allowed*.

The issues appear in the opinion and in the former report of the case.

A. J. Rittenhouse, J. W. Deweese, and W. S. Moran, for relator:

Blank ballots, and ballots from which it is impossible to determine the elector's choice, are not votes, are void, and should not be counted. (*Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229; *Rex v. Foxcroft*, 2 Burr. [Eng.], 1017; *State v. Green*, 37 O. St., 230; *St. Joseph Township v. Rogers*, 16 Wall. [U. S.], 644; *Cass County v. Johnson*, 5 Otto [U. S.], 360; *People v. Loomis*, 8 Wend. [N. Y.], 396; *Brown v. McCollum*, 76 Ia., 479.)

The intention of the voter must be ascertained from his ballot. (*Hawes v. Miller*, 56 Ia., 395; *State v. Foster*, 38 O. St., 604; *People v. Pease*, 27 N. Y., 84; *State v. Metzger*, 26 Kan., 395; *Clark v. Board of Commissions*, 33 Kan., 202.)

In the absence of any express regulation as to what shall constitute a majority or three-fifths of the voters or electors, when a majority or three-fifths of the voters or electors are required in favor of a proposition, the proposition is carried by a majority or three-fifths of the voters who vote on that proposition. (*Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229; *Rex v. Foxcroft*, 2 Burr. [Eng.], 1017; *State v. Green*, 37 O. St., 230; *St. Joseph Township v. Rogers*, 16 Wall. [U. S.], 644; *Cass County v. Johnson*, 5 Otto [U. S.], 360; *Everett v. Smith*, 22 Minn., 53; *State v. Mayor of St. Joseph*, 37 Mo., 270; *Sanford v. Prentice*, 28 Wis., 358; *Holcomb v. Davis*, 56 Ill., 414; *Heiskell v. Mayor of Baltimore*, 65 Md., 125; *Attorney General v. Shepard*, 62 N. H., 383; *Rushville Gas Co. v. City of Rushville*, 121 Ind., 208; *People v. Wiant*, 48 Ill., 266; *Walker v. Oswald*, 68 Md., 146; *Taylor v. Taylor*, 10 Minn., 81; *Gillespie v. Palmer*, 20 Wis., 554; *Bayard v. Klinge*, 16 Minn., 221.)

As to the mode of ascertaining what constitutes three-fifths of the voters, reference was made to the following authorities: *People v. Warfield*, 20 Ill., 163; *Louisville & N. R. Co. v. County Court*, 1 Sneed [Tenn.], 691; *State v. Winkelmeier*, 35 Mo., 103; *People v. Wiant*, 48 Ill., 266; *Chester & L. N. G. R. Co. v. Commissioners of Caldwell County*, 72 N. Car., 486; *Hawkins v. Supervisors of Carroll County*, 50 Miss., 735.

S. R. Smith, W. R. Starr, H. W. Keyes, and Reese & Gilkeson, contra.

References: *People v. Brown*, 11 Ill., 479; *State v. Crabtree*, 35 Neb., 108; *State v. Lancaster County*, 6 Neb., 474; *State v. Brassfield*, 67 Mo., 331; *State v. Sutterfield*, 54 Mo., 391; *State v. Mayor of St. Louis*, 73 Mo., 435; *State v. Walsh*, 25 Atl. Rep. [Conn.], 1; *Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322; *State v. Hill*, 20 Neb., 122; *State v. Wilson*, 24 Neb., 139; *Brower v. O'Brien*, 2 Ind., 423; *Lewis v. Commissioners of Marshall County*, 16 Kan., 102; *State v. Stevens*, 23 Kan., 456; *State v. Commissioners of Hodgeman County*, 23 Kan., 268; *Hagerty v. Arnold*, 13 Kan., 367; *Strong, Petitioner*, 20 Pick. [Mass.], 492; *Dalton v. State*, 11 Am. & Eng. Corp. Cases [O.], 78; *Patten v. Florence*, 38 Kan., 501; *Kreitz v. Behrensmeyer*, 125 Ill., 182.

RYAN, C.

This case has twice received the attention of this court, *vide State v. Roper*, 46 Neb., 724, and under same title, 46 Neb., 730. By the action of this court above last referred to there were left to contest the questions presented only such defendants as it is claimed were bound by reason of being county officers, to remove their respective

offices to McCook, the place where, as the relator insists, the county seat of Red Willow county was relocated by a special election held to determine that proposition. By the opinion first above referred to, the *mandamus* applied for was denied. Afterwards a rehearing of the matters considered in said opinion was granted, and we are now required to pass upon the question therein discussed. Practically the averments of the petition may be taken as true, for, in support of such as were controverted, and they were of minor importance, there was submitted such evidence as left no room for doubt. If, therefore, a fuller statement of the facts of this case than is herein given shall be deemed desirable, this can be found in the description of the averments of the petition in the opinion first filed. For our present purpose it is sufficient to say that as to the relocation of the county seat of Red Willow county the canvassing board's return of the votes cast at said election was, as shown by the totals, as follows:

At Indianola	867
At McCook	1,339
Ballots not reported or accounted for.....	25
Ballots rejected	1
Blank ballots	3
Ballots written for McCook and not counted	2

Total vote of precinct..... 2,237

In the former opinion (46 Neb., 724) it was said that the question presented was whether or not the petition, or application, which disclosed the above condition of the return, no other ground of criticism of the petition existing, stated a cause

of action, and it was held that the contention in favor of McCook could not be sustained. This contention was that, as Indianola and McCook together received 2,206 votes, and that as 1,339 for McCook were more than three-fifths required to locate the county seat at that place, it must thenceforward be held to be the county seat. The case of *State v. Lancaster County*, 6 Neb., 474, was in said opinion cited to support the holding thereof adverse to McCook, and as the case cited was correctly epitomized in said former opinion, such part of the language as was therein used for the purpose of making such epitome is quoted as follows: "Section 5, article 10, of the constitution provides: 'The legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine.' A proposition to adopt township organization was submitted to the voters of Lancaster county at the November, 1877, election. At the election held at that time there were cast 2,451 votes; 952 were cast in favor of, and 601 votes were cast against the proposition. The county commissioners refused to complete township organization as provided by law, and application was made to this court for a peremptory writ of *mandamus* to compel the county commissioners of Lancaster county to complete township organization in said county by dividing the county into towns and appointing town officers, etc., and this court, construing the constitutional provision quoted above, held that, in order to adopt township organization, a majority of all the legal voters of the county voting at the election must be recorded

in favor of township organization." It is unnecessary to consider other authorities cited in the aforesaid opinion in this case, for they clearly support the same general principle, and that is, that when a proposition of the nature of that under consideration is submitted at a general election, the highest number of votes cast on any proposition or for any candidate is assumed to be the total number of which the requisite majority must be obtained. Our present difficulty is not so much with the correctness of this abstract rule as with its application to the return of the canvassing board. If the votes cast for Indianola, 867, and for McCook, 1,339, should alone be considered, clearly McCook has more than three-fifths of the total 2,206 thereby made up. In the former opinion, however, the requirement of three-fifths of all votes cast was held to assume that in the votes cast should be included twenty-five ballots "not reported or accounted for," one "ballot rejected," three "blank ballots," and two "ballots written for McCook and not counted." A re-examination of this question has satisfied us that we were mistaken in construing the requirement of three-fifths of all the votes cast as indicating the necessary proportion of all the above items aggregating 2,237 ballots. With respect to the principles which should govern in determining questions of the nature of those now presented, a review of the most nearly analogous cases cited by counsel for the parties litigant herein, it is believed, will not be wholly useless.

In *Gillespie v. Palmer*, 20 Wis., 544, there was under consideration a section of the constitution which contained a proviso which made its adoption dependent upon an approval by a majority

of all the votes cast at such election. In the opinion of the court there was the following language: "What is the meaning of the word 'vote'? It is the expression of the choice of the voter for or against any measure, any law, or the election of any person to office."

In *State v. Green*, 37 O. St., 227, the following definition of the word "vote," given by Davies, J., in *People v. Pease*, 27 N. Y., 45, was approved: "A vote is but the expression of the will of a voter; and whether the formula to give expression to such will be a ballot or *viva voce*, the result is the same; either is a vote." Both parties to this litigation cite the decisions of the supreme court of Missouri, and upon behalf of the plaintiff there is relied upon the *County of Cass v. Johnston*, 95 U. S., 360, based on a Missouri case. These are of little practical value in this state, for the rule of construction therein is radically different from that adopted by this court, as is illustrated by the following quotation from *State v. Francis*, 95 Mo., 44: "When by law a vote is required or permitted to be taken, and a majority of the legal voters is mentioned in such law as being necessary to carry the proposed measure, such majority must be a majority of all the legal voters entitled to vote at such election and not a mere majority of those voting thereat."

In *Everett v. Smith*, 22 Minn., 53, the requirement of a "majority of such electors" was held to refer to those who voted, and in *Sanford v. Prentice*, 28 Wis., 358, the same construction was given the words "a majority of the legal voters of the said district."

In *Holcomb v. Davis*, 56 Ill., 413, there was under consideration a herd law which, by its own terms,

was declared not to be in force "until it shall be ratified by a majority of the legal voters of the county," etc., and this was held to require only a majority of the votes cast on the proposition submitted.

In *People v. Wiant*, 48 Ill., 263, it was said that if the return of the various poll books of the county showed a larger number of votes cast for circuit judge, or other officer, than were cast for and against the removal of the county seat, then that should be taken as the number of voters of the county.

In *County Seat of Linn County*, 15 Kan., 500, it was said: "It is a general rule, in respect to elections, that where the number of the electoral body is fixed, as in case of the directors or members of a corporation, or a legislature, there a majority means a majority of the whole body; but where the electoral body is indefinite in numbers, as in ordinary popular elections, there a majority means a majority of the votes actually cast."

With the exception of the case last above cited, those of other states, except Missouri, simply adhere to the rule adopted in this state. In the *County Seat of Linn County* there is, however, stated the distinction between corporate or political bodies having a fixed membership and those wherein the membership is indeterminate with respect to the data from which a majority must be estimated. Where there occurs at the same time a general and a special election, there is given an exact basis from which to ascertain the number of electors, and that is the greatest number of votes cast for any candidate or proposition. Where the election is special and confined to a single proposition, there is no occasion

for a resort to this method of finding the total number of electors, and this is especially true when the requisite majority is of the "votes cast."

As to the effect to be given to the disclosed fact that others than those counted were present, *Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229, is somewhat instructive, as will be seen by the following copy of that case as reported: "On a special verdict, the question was, whether Segrave, the town clerk of Nottingham, was legally elected. There were twenty-one electors present; nine of whom voted for Segrave; eleven protested against him, without voting for any one else, and one other said that 'he suspended doing anything.' It was argued by Mr. Caldecot, that this was such a negative upon Segrave, that his election was invalid. Serjeant Hewit, *contra*, in Easter Term last; and now *per tot. Cur.* The election is clearly good. The eleven protestant dissenters, having voted for nobody, could not put a negative upon the only man put in nomination, and Wilmot, J., cited K. and Withers, H., 8 Geo., 2; K. and Boscawen, P., 13 Anne; and Taylor and the Mayor of Bath, *temp.* Lee, C. J., to shew that, where a majority do nothing but merely dissent, they lose their votes." The proposition in support of which the citations were made by Wilmot, J., was stated and enforced in *State v. Green*, *supra*, in *Attorney General v. Shepard*, 62 N. H., 383, and in *Rushville Gas Co. v. City of Rushville*, 121 Ind., 206.

In *Walker v. Oswald*, 68 Md., 146, it was held that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquies-

cing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote.

In *People v. Town of Sausalito*, 39 Pac. Rep. [Cal.], 937, the question was whether or not there was, in fact, a majority of the votes cast "for incorporation." There were seven official ballots without a mark placed on either of them by any one to indicate his wish in any particular. These were held to be no votes, and discussing the effect to be given them, the court said they were not to be counted or considered for any purpose.

The respondents specially rely upon *State v. Walsh*, 62 Conn., 260. In this opinion were quoted the following provisions of the statute applicable to the election under consideration: "The presiding officer shall, with the certificate upon the result of the electors' meeting, which he is required to send by mail to the secretary of the state, send to the secretary his certificate of the whole number of names on the registry lists, the whole number checked as having voted at such elections, the whole number of names not checked, the number of ballots found in each box, namely, 'general and representative,' and the number of ballots in each box not counted as in the wrong box, and the number not counted for being double, and the number rejected for other causes, which other causes shall be stated specifically in the certificate." It appears from the statutory returns that eleven ballots in one town and one ballot in each of two other towns had been rejected, but the reason of such rejection neither appeared in returns of the presiding officers nor by the evidence offered in court. In respect to the contention that the rejected votes should not be con-

sidered in determining the whole number of votes cast, a majority of the supreme court of errors of Connecticut said: "Under a plurality rule, it is material only to count the votes of the two highest candidates. All scattering votes are practically disregarded. Under the majority rule, all scattering votes are important, and must be counted. * * * If it appears upon the face of the returns that the ballots were legally rejected, it would have presented a different case. There is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with the law; but there is no such presumption when it appears that the law was not complied with and the courts can make no intendment in favor of its legality. The law requires that the cause for rejecting a ballot shall be stated specifically in the certificate. That duty was wholly omitted. The act of rejection is illegal on its face. There can be no presumption to sustain an illegal act." It was in accordance with the views of a majority of the above court held that in ascertaining what candidates had received a majority, as distinguished from a plurality of all the votes cast, those rejected without a reason being given for such rejection must be reckoned in making up the grand total. If our statute required that the causes for rejecting ballots in county seat elections should be stated specifically in the certificate of the returns, the case just considered would have tended strongly to sustain the contention of the defendants. In connection with this particular statute, however, no such requirement exists. The rejection of ballots upon the face of the return seems not to have been in violation of the provisions of the statute or of

any law to which our attention has been called. The principle that "there is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with law," therefore, is applicable to the action of the various precinct officers with respect to the rejection of the twenty-five ballots not reported, or accounted for, the one ballot rejected, and the three blank ballots. Whether or not the same presumption extends to the two ballots written for McCook and not counted we need not determine, for these should either have been counted for McCook or, if in that respect rejected, they should have been rejected for all purposes. From the foregoing considerations it results that McCook, having received three-fifths of all the votes cast, should in this proceeding be held to be the county seat of Red Willow county. A writ will therefore issue as prayed.

WRIT ALLOWED.

HARRISON, J., and RAGAN, C., dissenting.

47 428
59 500

STATE OF NEBRASKA, EX REL. DAVID C. PATTERSON, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL.

FILED MARCH 5, 1896. No. 7814.

1. **County Canals: CONSTITUTIONALITY OF STATUTE: AMENDMENTS: CORPORATIONS.** By an act of the legislature there was provided to be appointed a board of trustees, which, when organized, should in law and equity be construed as a body corporate and politic, and which might in its corporate name sue and be sued, contract and be contracted with, acquire and hold real and per-

sonal property necessary for its corporate purposes, adopt and change its corporate seal, construct and operate a canal for the purposes of commerce and supplying power, heat, and light. *Held*, That this was not a municipal corporation, and that the attempt to make it a corporation was nugatory, because in effect the general corporation law in existence was thereby sought to be amended without its provisions being referred to in any way in the amendatory act.

2. **Statutes: TITLES OF BILLS: CONSTITUTIONAL LAW: CORPORATIONS: CANALS.** In the title of an act its scope was defined as authorizing counties of a prescribed description, among other powers conferred, to construct, own, and operate canals in certain defined ways, also to acquire right of way and land for such purposes, and also to provide for the appointment of a board of trustees to carry such purposes into effect. In the act itself provision was made for the appointment of a board of trustees, which, when organized, should in law and equity be construed a body corporate and politic, and in this board the act provided there should be vested the power to construct and operate such canal, and that, for those purposes, such board of trustees might in its own name acquire right of way and other required land even by condemnation proceedings if necessary. *Held*, That the subject of the act was not clearly expressed in its title, as required in section 11, article 3, of the constitution of Nebraska, and that, since this defect rendered inoperative its other provisions, the entire act is null and void.

ERROR from the district court of Douglas county. Tried below before AMBROSE, DUFFIE, and KEYSOR, JJ.

The opinion contains a statement of the case.

B. S. Baker, C. J. Greene, J. L. Kennedy, Charles Ogden, and George W. Covell, for plaintiff in error:

The act in question does not violate the following provisions of section 11, article 3, of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its

title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." (*People v. Nelson*, 133 Ill., 574; *People v. Mahaney*, 13 Mich., 481; *Wellington, Petitioner*, 16 Pick. [Mass.], 87; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St., 287; *Powell v. Commonwealth*, 114 Pa. St., 265; *Hawthorne v. People*, 109 Ill., 302; *People v. Hazelwood*, 116 Ill., 319; *Wulff v. Aldrich*, 124 Ill., 591; *Field v. People*, 2 Scam. [Ill.], 79; *Lane v. Dorman*, 3 Scam. [Ill.], 238; *People v. Marshall*, 1 Gil. [Ill.], 672; *Newland v. Marsh*, 19 Ill., 376; *Bigelow v. West Wisconsin R. Co.*, 27 Wis., 478; *Attorney General v. City of Eau Claire*, 37 Wis., 400; *Doc v. Norris*, 4 N. H., 16; *People v. Supervisors of Orange County*, 17 N. Y., 235; *Bitters v. Commissioners of Fulton County*, 81 Ind., 125; *Clare v. People*, 9 Colo., 122; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 234; *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *Dogge v. State*, 17 Neb., 143; *State v. Babcock*, 23 Neb., 128.)

The power conferred upon the judges of the district court by the act in question, to appoint canal trustees, is one which the judges may exercise under the provisions of the constitution, and the act is not unconstitutional in conferring such power upon them. (*People v. Nelson*, 133 Ill., 600; *People v. Williams*, 51 Ill., 63; *People v. Morgan*, 90 Ill., 558; *Moore v. People*, 109 Ill., 499; *Kilgour v. Drainage Commissioners*, 111 Ill., 342; *Huston v. Clark*, 112 Ill., 344; *Owners of Lands v. People*, 113 Ill., 296; *People v. Hoffman*, 116 Ill., 587; *Field v. People*, 2 Scam. [Ill.], 79; *McArthur v. Nelson*, 81 Ky., 67; *David v. Portland Water Committee*, 14 Ore., 98; *Sheboygan v. Parker*, 3 Wall. [U. S.], 93; *Mississippi v. Johnson*, 4 Wall. [U. S.], 475; *Flour-*

noy v. City of Jefferson, 17 Ind., 169; *Tennessee & C. R. Co. v. Moore*, 36 Ala., 371; *Commissioner of the General Land Office v. Smith*, 5 Tex., 471; *Life & Fire Ins. Co. of New York v. Wilson*, 8 Pet. [U. S.], 291; *Morton v. Comptroller General*, 4 Rich. [S. Car.], 430; *Grider v. Tally*, 77 Ala., 422; *Rains v. Simpson*, 50 Tex., 495; *Kendall v. Stokes*, 3 How. [U. S.], 87; *South v. Maryland*, 18 How. [U. S.], 396; *Ex parte Virginia*, 100 U. S., 339; *Conner v. Long*, 104 U. S., 228; *People v. Supervisors*, 35 Barb. [N. Y.], 408; *Pennington v. Streight*, 54 Ind., 376; *Ex parte Batesville*, 39 Ark., 82; *Evans v. Etheridge*, 96 N. Car., 42; *Crane v. Camp*, 12 Conn., 464; *State v. Doyle*, 40 Wis., 174; *Washington County v. Boyd*, 64 Mo., 179; *Platter v. County Commissioners*, 103 Ind., 360; *People v. Bush*, 40 Cal., 344; *Tillotson v. Cheetham*, 2 Johns. [N. Y.], 63; *Jackson v. Buchanan*, 89 N. Car., 74; *Baldwin v. Hewitt*, 88 Ky., 673; *State v. Sneed*, 84 N. Car., 816; *Nash v. People*, 36 N. Y., 607; *Mathews v. Houghton*, 11 Me., 377; *Wilson v. Mayor of New York*, 1 Den. [N. Y.], 595; *Marion County v. Moffett*, 15 Mo., 406; *Ray County v. Bentley*, 19 Mo., 236; *Cedar County v. Johnson*, 50 Mo., 227; *Town Board v. Boyd*, 58 Mo., 279.)

The act does not violate section 15, article 3, of the constitution, prohibiting special legislation. (*State v. Robinson*, 35 Neb., 401; *State v. Spaude*, 37 Minn., 322; *Hingle v. State*, 24 Ind., 28; *Hymes v. Aydelott*, 26 Ind., 421; *Toledo, L. & B. R. Co. v. Nordyke*, 27 Ind., 95; *Conner v. City of New York*, 2 Sand. [N. Y.], 355; *Wheeler v. City of Philadelphia*, 77 Pa. St., 338; *Kilgore v. Magee*, 85 Pa. St., 401; *Commonwealth v. Patton*, 88 Pa. St., 258; *McAunich v. Mississippi & M. R. Co.*, 20 Ia., 338; *Haskel v. City of Burlington*, 30 Ia., 232; *State v. Tolle*, 71

Mo., 645; *Marmett v. City of Cincinnati*, 45 O. St., 63; *Hunzinger v. State*, 39 Neb., 653; *McClay v. City of Lincoln*, 32 Neb., 412.)

The act is not void on the ground that it provides for taking private property under the guise of taxes for other than a public purpose. (*People v. Mayor of Brooklyn*, 4 N. Y., 419; *Williams v. Mayor of Detroit*, 2 Mich., 560; *Scorill v. City of Cleveland*, 1 O. St., 126; *Northern Ind. R. Co. v. Connelly*, 10 O. St., 159; *Washington Avenue*, 69 Pa. St., 352; *White v. People*, 94 Ill., 604; *Varick v. Smith*, 5 Paige Ch. [N. Y.], 160; *Napa Valley R. Co. v. Napa County*, 30 Cal., 487; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Parham v. Justices*, 9 Ga., 341; *Water-Works Co. v. Burkhart*, 41 Ind., 364; *Challis v. Atchison, T. & S. F. R. Co.*, 16 Kan., 117; *New Central Coal Co. v. George's Creek Coal Co.*, 37 Md., 537; *Haverhill Bridge Proprietors v. County Commissioners*, 103 Mass., 120; *Dietrich v. Murdock*, 42 Mo., 379; *County Court v. Griswold*, 58 Mo., 175; *Concord R. Co. v. Greely*, 17 N. H., 47; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y., 234; *In re Townsend*, 39 N. Y., 171; *Rogers v. Bradshaw*, 20 Johns. [N. Y.], 735; *Willyard v. Hamilton*, 7 O. [Part 2], 111; *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch [U. S. C. C.], 599; *Darlington v. City of New York*, 31 N. Y., 164; *Bell v. Mayor of New York*, 105 N. Y., 142; *Spalding v. Andover*, 54 N. H., 55; *Skinkle v. Esser Road Board*, 47 N. J. Law, 93; *Hubbell v. City of Viroqua*, 67 Wis., 348; *City of San Francisco v. Canaran*, 42 Cal., 542; *Payne v. Treadwell*, 16 Cal., 233; *Hart v. Burnett*, 15 Cal., 568; *People v. Mayor of Chicago*, 51 Ill., 31; *Richland County v. Lawrence County*, 12 Ill., 8; *Trustees of Schools v. Tatman*, 13 Ill., 30; *Palmer v. Fitts*, 51 Ala., 492.)

References as to taking of private property for public use and delegation of powers to private individuals or corporations: *President & Commissioners v. State*, 45 Ala., 399; *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass., 144; *Montpelier v. East Montpelier*, 29 Vt., 12.

Canal trustees are not county officers within the meaning of the provision of the constitution providing for the election of county and township officers. (*United States v. Hatch*, 1 Pinney [Wis.], 182; *Horton v. Town of Thompson*, 71 N. Y., 521; *Liebman v. City of San Francisco*, 24 Fed. Rep., 719; *Hoagland v. City of Sacramento*, 52 Cal., 149; *Tone v. Mayor of New York*, 70 N. Y., 165; *Shepherd v. Commonwealth*, 1 S. & R. [Pa.], 1; *Bryant v. Robbins*, 35 N. W. Rep. [Wis.], 545; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392; *Walker v. City of Cincinnati*, 21 O. St., 14; *Sheboygan County v. Parker*, 3 Wall. [U. S.], 93; *People v. Bennett*, 54 Barb. [N. Y.], 480.)

References to the question of corporate or county purposes for which a county may issue bonds: *Beals v. Amador*, 35 Cal., 634; *Harcourt v. Good*, 39 Tex., 456; *City of Louisville v. Hyatt*, 2 B. Mon. [Ky.], 178; *Justices of Clarke County v. Paris Turnpike Co.*, 11 B. Mon. [Ky.], 178; *Cheaney v. Hooser*, 9 B. Mon. [Ky.], 329; *City of Lexington v. McQuillan*, 9 Dana [Ky.], 513; *Slack v. Marysville & L. R. Co.*, 13 B. Mon. [Ky.], 1; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 O. St., 77; *Goddin v. Grump*, 8 Leigh [Va.], 120; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St., 147; *Walker v. City of Cincinnati*, 21 O. St., 15; *Quincy, M. & P. R. Co. v. Morris*, 84 Ill., 411; *Taylor v. Thompson*, 42 Ill., 9; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill., 268; *Nichol v. City of Nashville*, 9 Humph. [Tenn.], 252; *Cotton v. Leon County*, 6 Fla., 621; *Stockton v. Powell*, 29 Fla., 1.

Public corporations: *Trustees of Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518; *Trustees of Schools v. Tatman*, 13 Ill., 30; *Philips v. Bury*, 2 Term Rep. [Eng.], 346; *Allen v. McKean*, 1 Sumn. [U. S.], 276; *People v. Morris*, 13 Wend. [N. Y.], 325; *Penobscot Broom Corporation v. Lamson*, 16 Me., 224; *State v. Dodge County*, 8 Neb., 124; *State v. Lancaster County*, 4 Neb., 540; *Darst v. Griffin*, 31 Neb., 668.

The power to construct drains is no part of the usual powers belonging to town and county governments, nor is the power to construct canals any part of the usual powers belonging to such governments, but is a special authority given for a particular purpose and may be conferred by legislative power on any person or body. (*Bryant v. Robbins*, 70 Wis., 258; *State v. Riordan*, 24 Wis., 484; *State v. Supervisors*, 25 Wis., 339; *State v. Dousman*, 28 Wis., 541; *McRae v. Hogan*, 39 Wis., 529; *State v. Supervisors*, 62 Wis., 376; *Soens v. City of Racine*, 10 Wis., 271*; *Bond v. Kenosha*, 17 Wis., 292; *Johnson v. City of Milwaukee*, 40 Wis., 315; *Hagar v. Reclamation District*, 111 U. S., 701; *Wurts v. Hoagland*, 114 U. S., 606; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392; *People v. Salomon*, 51 Ill., 37; *People v. Walsh*, 96 Ill., 232; *Walker v. City of Cincinnati*, 21 O. St., 15.)

The canal act is not unconstitutional on the ground that it makes party affiliation a qualification for office. (*In re Supreme Court Commissioners*, 37 Neb., 655; *State v. Bemis*, 45 Neb., 724.)

The scope of the act was fairly reflected in its title. (*People v. McCallum*, 1 Neb., 194; *White v. City of Lincoln*, 5 Neb., 505; *State v. Ream*, 16 Neb., 683; *In re White*, 33 Neb., 812; *Perry v. Gross*, 25 Neb., 830; *Poffenbarger v. Smith*, 27 Neb., 788;

Kansas City & O. R. Co. v. Frey, 30 Neb., 792; *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 737; *Singer Mfg. Co. v. Fleming*, 39 Neb., 679; *Kleckner v. Turk*, 45 Neb., 176; *Van Horn v. State*, 46 Neb., 62; *People v. State Ins. Co.*, 19 Mich., 392; *People v. Nelson*, 133 Ill., 565; *McCaslin v. State*, 44 Ind., 151; *State v. Town of Union*, 33 N. J. Law, 350; *Simpson v. Bailey*, 3 Ore., 516; *David v. Portland Water Co.*, 14 Ore., 98; *People v. Commissioners*, 47 N. Y., 501; *McArthur v. Nelson*, 81 Ky., 67; *In re Application Mayor City of New York*, 99 N. Y., 570.)

The act did not authorize the formation of a private corporation in a manner in effect amendatory of the general corporation law. (1 Dillon, *Municipal Corporations*, secs. 29, 30; *Ten Eyck v. Delaware & Raritan Canal Co.*, 19 N. J. Law., 5; *Tinsman v. Belvidere D. R. Co.*, 26 N. J. Law, 148; *Miners Bank of Dubuque v. United States*, 1 Greene [Ia.], 553; *Trustees of University v. Winston*, 5 Stewart & P. [Ala.], 17; *People v. Morris*, 13 Wend. [N. Y.], 324; *Dean v. Davis*, 51 Cal., 406; *Hoke v. Perdue*, 62 Cal., 545; *People v. Reclamation District*, 53 Cal., 346; *People v. Williams*, 56 Cal., 647; *People v. La Rue*, 67 Cal., 526; *People v. Salomon*, 51 Ill., 37.)

Charles Offutt, William S. Poppleton, and Charles S. Lobingier, contra:

The constitutionality of the act may be determined in this proceeding. (*State v. Stevenson*, 18 Neb., 416; *State v. Douglas County*, 18 Neb., 506; *State v. Bartley*, 40 Neb., 298; *State v. Cobb*, 44 Neb., 434; *Van Horn v. State*, 46 Neb., 62; *State v. Tappan*, 29 Wis., 664; *State v. Nelson*, 21 Neb., 572; *State v. Wallichs*, 13 Neb., 278.)

The canal trustees are county officers, and the

provision for their appointment contravenes article 10, section 4, of the constitution. (*Speed v. Crawford*, 3 Met. [Ky.], 207; *People v. Hurlburt*, 24 Mich., 98; *State v. Lancaster County*, 6 Neb., 474; *State v. Brennan*, 29 N. E. Rep. [O.], 593; *Davies v. Superrisors*, 50 N. W. Rep. [Mich.], 862; *Varney v. Justice*, 6 S. W. Rep. [Ky.], 457; *Ice v. Marion County*, 20 S. E. Rep. [W. Va.], 809; *United States v. Hatch*, 1 Pinney [Wis.], 182; *Bryant v. Bobbins*, 35 N. W. Rep. [Wis.], 545; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392-401; *People v. Nostrand*, 46 N. Y., 375; *People v. Rathbone*, 40 N. E. Rep. [N. Y.], 395; *United States v. Hartwell*, 6 Wall. [U. S.], 385; *United States v. Maurice*, 2 Brock. [U. S.], 103; *Smith v. Lynch*, 29 O. St., 261; *State v. Kennon*, 7 O. St., 547; *In re Attorneys and Counselors*, 20 Johns. [N. Y.], 492; *State v. Wilson*, 29 O. St., 347; *Commonwealth v. Evans*, 74 Pa. St., 124.)

In imposing upon the district judges the duty of appointing canal trustees, the act requires the exercise by such judges of other than judicial power, and thus contravenes article 2, section 1, of the constitution. This appears from the purpose of the provision as reflected in its history. (Thayer, *Cases on Constitutional Law*; Aristotle, *Politics*, book 6, ch. 14; Works of John Adams, vol. 4, p. 216; Montesquieu, *Spirit of Laws*.) This is clear also from the meaning of the phrase "judicial power" (*State v. Denny*, 118 Ind., 449), and of the term "jurisdiction." (*United States v. Arredondo*, 6 Pet. [U. S.], 691-709; *Rhode Island v. Massachusetts*, 12 Pet. [U. S.], 657; *Sinking Fund Cases*, 99 U. S., 761; 6 Bracton, *Laws of England* [Master of Rolls' ed.], p. 159.)

Appointment to office is the exercise neither of judicial power nor of jurisdiction. (*Miller v.*

Wheeler, and Crawford v. Norris, 33 Neb., 765; *Supervisors of Election*, 114 Mass., 247; *Houseman v. Montgomery*, 58 Mich., 364; *State v. Hyde*, 121 Ind., 20; *State v. Denny*, 118 Ind., 449; *Ex parte Griffiths*, 118 Ind., 83; *Heinlen v. Sullivan*, 64 Cal., 378; *Burgoyne v. Supervisors*, 5 Cal., 9; *Dickey v. Hurlburt*, 5 Cal., 343; *People v. Nevada*, 6 Cal., 143; *Houston v. Williams*, 13 Cal., 24; *People v. Sanderson*, 30 Cal., 160; *Smith v. Strother*, 68 Cal., 194; *People v. Bennett*, 29 Mich., 451; *Shephard v. City of Wheeling*, 30 W. Va., 479; *Minnesota v. Young*, 29 Minn., 474; *State v. Kennon*, 7 O. St., 561; *State v. Barbour*, 53 Conn., 76; *Taylor v. Commonwealth*, 3 J. J. Marsh. [Ky.], 401; *Hayburn's Case*, 2 Dall. [U. S.], 409; *United States v. Ferreira*, 13 How. [U. S.], 43; *Gordon's Case*, 117 U. S., 697; *In re Sanborn*, 148 U. S., 222; *In re Pacific Railway Commission*, 32 Fed. Rep., 241; *In re McLean*, 37 Fed. Rep., 648.) The Illinois cases relied on by plaintiff in error are unsound and not well considered, and the cases from other jurisdictions are not in point.

The act is special legislation, in affecting the powers of judges of the district courts of certain counties only, and contravenes article 6, section 19, of the constitution. (*State v. Shropshire*, 4 Neb., 411; *People v. Nelson*, 133 Ill., 600; *People v. Rumsey*, 64 Ill., 44.)

Both the title and the body of the act contain more than one subject. (*Trumble v. Trumble*, 37 Neb., 340; *State v. Lancaster County*, 6 Neb., 474; *Smalls v. White*, 4 Neb., 357; *State v. Lancaster County*, 17 Neb., 85; *Van Horn v. State*, 46 Neb., 62; *State v. Bemis*, 45 Neb., 724; *People v. Fleming*, 7 Colo., 230.)

The subject of the act is not clearly expressed in the title. (*Burlington & M. R. R. Co. v. Saunders*

County, 9 Neb., 507; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Kleckner v. Turk*, 45 Neb., 176.)

The body of the act provides a new mode of creating corporations of which the title gives no hint; contains provisions relating to irrigation and water rights not indicated in the title; provides for condemnation of land, for leasing the same to private individuals for manufacturing purposes, with no hint of this in the title; confers important and far-reaching powers upon the district judges, which nothing in the title suggests, and vitally affects counties of less than 125,000 inhabitants, without purporting to do so in the title. (*Blair v. State*, 17 S. E. Rep. [Ga.], 96; *Snell v. City of Chicago*, 24 N. E. Rep. [Ill.], 532; *Wilcox v. Paddock*, 31 N. W. Rep. [Mich.], 609; *Niles v. Schoolcraft*, 60 N. W. Rep. [Mich.], 771; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Adams v. San Angelo Water-Works Co.*, 25 S. W. Rep. [Tex.], 605; *Clark v. Board of Commissioners of Wallace County*, 39 Pac. Rep. [Kan.], 225.)

The act is void, because, while amendatory in character, it fails to refer to existing acts with whose provisions it is clearly in conflict. (*Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *In re House Roll 284*, 31 Neb., 505; *Lancaster County v. Hoagland*, 8 Neb., 38; *Ryan v. State*, 5 Neb., 276; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 234; *People v. McCallum*, 1 Neb., 182; *People v. Nelson*, 133 Ill., 574.)

Special and exclusive privileges are granted by the act to certain counties, thus infringing article

3, section 16, of the constitution. (*McCarthy v. Commonwealth*, 5 Atl. Rep. [Pa.], 215; *State v. Justices*, 1 S. W. Rep. [Mo.], 307.)

The act is invalid, because it delegates to the electors of but one county the power to determine when its provisions shall be operative. (*In re Municipal Suffrage*, 36 N. E. Rep. [Mass.], 488; *Barto v. Himrod*, 8 N. Y., 483; *Santo v. State*, 2 Ia., 165; *Ex parte Wall*, 48 Cal., 279; *Bradshaw v. Lankford*, 21 Atl. Rep. [Md.], 66.)

The act is invalid, because it makes party affiliation a test for office. (Constitution, art. 1, sec. 4; *People v. Hurlburt*, 24 Mich., 93; *State v. Seavey*, 22 Neb., 466.)

The act is unconstitutional, because it requires a tax levy for other than public purposes, the conduct by the county of other than public business, and the taking of private property "without due process of law." (Cooley, Taxation [2d ed.], p. 55; *Coats v. Campbell*, 37 Minn., 498; *Sharpless v. Mayor*, 21 Pa. St., 168, 169; *Loan Association v. Topeka*, 20 Wall. [U. S.], 664; *Attorney General v. City of Eau Claire*, 37 Wis., 400; *Nalle v. City of Austin*, 21 S. W. Rep. [Tex.], 375; *People v. Parks*, 58 Cal., 624; *People v. Salem*, 20 Mich., 452; *Hanson v. Vernon*, 27 Ia., 28; *Commonwealth v. Maxwell*, 27 Pa. St., 444; *Mott v. Pennsylvania C. R. Co.*, 30 Pa. St., 9; Sedgwick, Constitutional Law, pp. 174, 175, 515; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *Lowell v. City of Boston*, 111 Mass., 454; *Kingman v. City of Brockton*, 26 N. E. Rep. [Mass.], 998; *Parkersburg v. Brown*, 106 U. S., 487; *Ottawa v. Carey*, 108 U. S., 110; *Cole v. La Grange*, 113 U. S., 1; *Allen v. Jay*, 60 Me., 124; *Mather v. City of Ottawa*, 114 Ill., 659; *State v. Osaukee Township*, 14 Kan., 419; *Curtis v. Whipple*, 24 Wis., 350; *Weismer v. Douglas*, 21 Am. Rep. [N. Y.],

586; *People v. Batchellor*, 53 N. Y., 128; *State v. Adams County*, 15 Neb., 568; *Getchell v. Benton*, 30 Neb., 870; *Philadelphia Association v. Wood*, 39 Pa. St., 73; *Mead v. Acton*, 139 Mass., 341; *People v. Mayor*, 4 N. Y., 419.)

The act is invalid, because it attempts to create a corporation by a special law, and particularly because it authorizes the formation of a private corporation in a manner which, in effect, amends the general corporation law. (*State v. Atchison & N. R. Co.*, 24 Neb., 143; *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416; *Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *State v. Cobb*, 44 Neb., 434; *In re House Roll 28½*, 31 Neb., 505; *Lancaster County v. Hoagland*, 8 Neb., 38; *Ryan v. State*, 5 Neb., 276.)

H. H. Baldrige, also for defendants in error:

The legislature of the state cannot delegate to the judges of the district court the power to appoint trustees to construct a canal as provided by the act. (*Achley's Case*, 4 Abb. Pr. [N. Y.], 35; *Taylor v. Commonwealth*, 3 J. J. Marsh. [Ky.], 401; *Heinlen v. Sullivan*, 64 Cal., 378; *Houseman v. Kent*, 58 Mich., 365; *Gordon v. United States*, 117 U. S., 697; *Walker v. City of Cincinnati*, 21 O. St., 15; *Case of Supervisors of Election*, 114 Mass., 247.)

The powers of the district court are not broad enough to make appointments to office. (*Osborn v. Bank of United States*, 9 Wheat. [U. S.], 738; *Johnson v. Jones*, 2 Neb., 135.)

The act is void. Canal trustees are county officers, and the constitution provides that county officers shall be elected. (*United States v. Maurice*, 2 Brock. [U. S.], 96; *United States v. Hartwell*, 6 Wall. [U. S.], 393; *In re Hathaway*, 71 N. Y., 238;

Bradford v. Justices, 33 Ga., 332; *Commonwealth v. Evans*, 74 Pa. St., 139; *People v. Langdon*, 40 Mich., 673; *Rowland v. Mayor*, 83 N. Y., 376; *State v. Stanley*, 66 N. Car., 59; *Hall v. State*, 39 Wis., 79; *Shelby v. Alcorn*, 36 Miss., 273; *State v. Valle*, 41 Mo., 31; *People v. Nostrand*, 46 N. Y., 375.)

Wharton & Baird and *Frank T. Ransom*, also for defendants in error.

RYAN, C.

At the last session of the legislature of this state there was passed and approved an act entitled "An act enabling counties in the state of Nebraska having a population of not less than 125,000 inhabitants to issue bonds to construct, own and operate canals in the state of Nebraska for navigation, water power and other purposes, and generating of electric and other power and transmitting of the same for light, heat, power, and other purposes; and to acquire right of way and land for such purposes, and to provide for the appointment of a board of trustees to carry into effect the purposes of this act, and to levy taxes to pay the same and interest thereon, and to repeal section 2032a, Consolidated Statutes, 1893." (Session Laws, 1895, ch. 71.) Douglas county alone in this state has a population adequate to render available the above provisions. In the body of the act in question it is provided that the bonds which may be issued shall not exceed in amount ten per cent of the assessed valuation of the county, and that, whether or not bonds shall be voted, must first be submitted to the voters of the county in compliance with the prayer of a petition signed by 2,500 legal voters

asking such submission, which petition must be presented to and acted upon by the county commissioners. A petition in conformity with the above requirements was presented to the board of county commissioners of Douglas county. This board refused to call an election, and by *mandamus* in the proper district court it was sought by one of the petitioners to compel the county board to order an election. The judgment of the district court was adverse to relator, and the correctness of this judgment is now challenged by this error proceeding.

It is very difficult to summarize the provisions of the above act within a reasonably brief space, nevertheless this shall now be attempted. After the proposition to issue bonds has been carried it becomes the duty of the county commissioners to notify the judges of the district court of the result of the election, whereupon these judges are required to appoint five trustees. Each of the trustees must give an official bond in such amount as the board of county commissioners may fix. It is provided that the board of trustees shall, "when duly organized, be construed in law and equity a body corporate and politic, and shall be known by the name and style of 'The Board of Canal Trustees of ——— County, Nebraska,' and by such name and style may sue and be sued, contract and be contracted with, acquire and hold real estate and personal property necessary for its corporate purposes and adopt a common seal and alter the same at pleasure, and shall exercise all the powers necessary to carry into effect the object for which such board shall have been appointed, and shall control and manage all the affairs and property which shall come into the

hands or under the control of such board of trustees." (Session Laws, 1895, p. 307, ch. 71, sec. 1.) It further provides: "Such board of trustees shall have full power to pass all necessary rules and regulations for the proper management and conduct of the business of such board, and of such corporate body, and for carrying into effect the objects for which such board is created. Any board of canal trustees organized as provided in this act shall have power to make preliminary surveys, lay out, acquire right of way and other lands within such county or within twenty miles of the limits of such county, necessary for its purposes, establish, construct, and maintain and operate a canal through any county or counties in this state for navigation, water power, and all other purposes, except irrigation, for generating electric and other power and transmitting the same for light, heat, power, and all other purposes except irrigation, and may dispose of the water in such canal for domestic and for all other purposes except irrigation, and to control and dispose of water power, electric, pneumatic, hydraulic, or other power generated by such water power, also to operate a line of boats on such canal, or granting the right for such navigation to any party or parties upon payment of tolls, subject to such rules and regulations as shall be established and adopted by such board of trustees; Provided, That no exclusive right shall be granted to any person or persons or corporations, except that such board may lease to any party, ground for manufacturing or industrial purposes for a term or terms of years, which ground so leased shall be subject to reappraisal for rental purposes every twenty years. All revenues de-

rived by said board of trustees from every source shall be deposited with the county treasurer of such county and by him be placed in a fund to be designated as the canal fund, the general expense, maintenance, extension, or enlargement of such canal or other works connected therewith shall be paid out of said canal fund by the county treasurer of such county upon official orders issued by the board of canal trustees. All surplus moneys in said fund not needed for canal expenses, improvement, or enlargement shall be placed in the general fund of the county and may be used for all purposes for which the county general fund, as now designated, may be used. Such board of trustees for and on behalf of such county may acquire by purchase, condemnation, or otherwise, whether within or without the county limits, if within twenty miles of the limits of such county, any and all real property necessary to carry into effect the objects for which such board shall have been appointed and which may be required for its corporate purposes and right of way for the canal and right of way privileges and easements, sites for reservoirs and dams, power houses, and additional lands to be leased to persons, parties, or corporations purchasing or using such power; Provided, That all the moneys for the purchase of any real property shall be paid before possession is taken thereof, or any work done thereon, and all moneys for the condemnation of any property shall be paid into the county court of the county in which such property shall be condemned. Whenever the board of canal trustees of any county appointed under this act shall require any private property necessary for the purposes aforesaid, such prop-

erty shall be acquired or condemned as nearly as may be in the same manner as is provided by law for the condemnation of right of way for railroad corporations within this state; Provided, That proceedings to acquire possession by condemnation of property so taken shall in all cases be instituted in the county where the property sought to be taken or damaged is situated; Provided, That when it shall be necessary in making any improvement by such board of trustees to enter upon any property held for public use they shall have power to do so, and may acquire right of way upon and over such property held for public use in the same manner as is above provided for acquiring private property by condemnation of such board of trustees, and may enter upon, use, widen, deepen, and improve any stream, waterway, or lake that may be necessary to be used for such canal purposes, but in cases where public roads are crossed by such canal or tail-race or outlets thereof, such board of trustees shall cause to be constructed and maintained, bridges over such canal or tail-race or outlets thereof." (Session Laws, 1895, p. 308, ch. 71, sec. 1.)

It is scarcely necessary, perhaps, to note that in respect to the canal proposed to be constructed and operated the board of county commissioners of Douglas county, after they shall have ordered an election, have but little more to say or do. The duty is devolved upon the board to notify the district judges of the result of the election upon the proposition to issue bonds, whereupon the judges must appoint five trustees. These trustees, when organized so as to constitute a board, take charge of the construction and operation of the canal as property owned by itself

for the use and benefit of the county. There is a provision that the title shall be held for the county, but there is no method by which the county, *co nomine*, can assert ownership or an independent right of possession. All revenues, it is true, must be deposited with the county treasurer, but these must be kept as a distinct fund and from this fund the board of trustees, upon its own orders, may require payments to be made, and only such surplus as the board of trustees does not require may be used by the county. The county commissioners have no voice in allowing or rejecting claims, and there is reserved no right of appeal in favor of either the county or a taxpayer. There is required no accounting by the trustees, either of moneys received or expended, and, without the consent of property owners thereby affected, the jurisdiction of these functionaries of Douglas county is extended over a circumjacent strip twenty miles in width, for certain purposes attached to and treated as a mere outlying province.

Counsel for plaintiff in error, in his reargument of this case, made in compliance with a request to that effect, contends that the provisions with respect to the creation of a body corporate and politic finds judicial sanction in *People v. Kelly*, 76 N. Y., 475, *Walker v. City of Cincinnati*, 21 O. St., 14, *People v. Salomon*, 51 Ill., 37, and in several California irrigation cases. Before attempting an expression of our own views, we shall indicate why these cases fail to establish the propositions in support of which they were cited.

In *People v. Kelly* an amendment of the constitution of the state of New York had prohibited cities

and other municipal corporations from becoming interested in any stocks or bonds of any corporation, and from incurring any indebtedness except for county, city, or village purposes. It became necessary for the construction of the bridge between the cities of New York and Brooklyn that those cities should own the aforesaid bridge, and, for its joint construction and control, a board of sixteen trustees, one-half of whom were to be appointed by the authorities of each city, was provided. This board was in no sense a body corporate or politic.

In *Walker v. City of Cincinnati*, Scott, C. J., in delivering the opinion of the court, said: "The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in the state or in any other state, through the agency of a board of trustees consisting of five persons, to be appointed by the superior court of such city, or if there be no superior court, then by the court of common pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of a majority vote of the electors of the city, at a special election, to be ordered by the city council, after twenty days' public notice. For the accomplishment of this purpose the board of trustees is authorized to borrow a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city

and a tax to be annually levied by the council, sufficient with such net income to pay the interest and provide a sinking fund for the final redemption of the bonds." Speaking of the trustees above provided for it was said in the opinion above quoted from: "But it is clear that the trustees are a mere agency through which the city is authorized to operate for its own sole benefit. Neither as individuals, nor as a board, have they any beneficial interest in the fund which they are to manage, or in the road which they are to build. They are in fact, as well as in name, but trustees, and the sole beneficiary of the trust is the city of Cincinnati." These trustees, when organized as a board, certainly were not "a body corporate and politic."

In *People v. Salomon* the scope of the decision, in so far as it is applicable to this case, is thus expressed in the fourth paragraph of the syllabus: "Under the act of February 24, 1869, providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district, and the people of the towns affected by the act having, by a vote, accepted its provisions, the board of park commissioners thereby created, to whom was committed the entire control of the park, became a municipal corporation, in whom it was competent for the legislature to vest the power to assess and collect taxes within the park district so created, for the special corporate purpose of its creation, and such is the effect of that portion of the act which requires the county clerk of the county in which the district is situated, on the estimate of the park commissioners, to place the amount required, within certain limits, in the tax

warrants for the towns embraced in the district." The nature and functions of a district of the kind above referred to are found to exist in irrigation districts, and, as the discussion of districts of this latter class applies equally to the park district above referred to, no further space will be devoted to a consideration of *People v. Salomon, supra*.

Counsel for plaintiff in error cites several California cases as being analogous in principle to the one at bar, but apparently have overlooked the case of *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb., 411, in which this court has already considered this class of adjudications. Referring to chapter 69, Laws, 1895, Post, J., in the case just cited said: "The act provides for the creation of irrigation districts comprising property susceptible of irrigation from the same source and by means of the same system of works. It requires a petition to be filed with the county board, signed by a majority of the resident freeholders who are qualified electors and who own a majority of the whole number of acres of land belonging to resident electors, particularly defining the boundaries of the proposed district. The county board may, on the final hearing of the petition, and after notice thereof to all parties interested, define the boundaries, making such changes thereof as may be deemed proper, but including therein no lands which are not susceptible of irrigation by the same system. The question is then, at a special election, submitted to the electors of the proposed district, who are also owners of real estate therein. Upon the adoption of the proposition a record thereof is to be filed in the office of the county clerk of each county in which any portion of the land included in said

district is situated, and immediately thereafter the county board shall call a special election, at which there shall be chosen a treasurer, an assessor, and three directors." In respect to the nature of irrigation districts it was said in this opinion: "The validity of this species of legislation was first called in question in *Turlock Irrigation District v. Williams*, 76 Cal., 360, in which it was held under constitutional provisions substantially similar to ours that the districts contemplated by the statute of that state are *quasi*-public corporations in the sense that the purpose of their organization is the general public benefit." Having reviewed at some length the trend of judicial decisions in California, POST, J., quoted with approval the language of Harrison, J., in *Re Madera Irrigation District*, 92 Cal., 296, from which quotation the following is reproduced: "It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not 'created' until the voters of the district have accepted the terms of the act, the answer is that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its char-

acter and details are within the discretionary power of the legislature. We know no more appropriate mode of such indication than the affirmative vote of those who are affected by the acceptance of the terms of the act." From the very instructive case of *Board of Directors of Alfalfa Irrigation District v. Collins* there is clearly deducible the conclusions that irrigation districts organized as above indicated are public, rather than municipal corporations; that their officers are public agents, and that, having been created by vote of the people concerned, duly authorized thereto by a constitutional law, an irrigation district may properly perform the appropriate functions with which it is endowed. Neither the California cases nor the other cases cited on behalf of plaintiff in error furnish any analogies which can be of use with respect to the case under consideration. How, then, shall we classify this "body corporate and politic," which, differing in its genesis and functions from any known political organization, nevertheless assumes the performance of duties and the exercise of functions which in no way resemble those by law devolved upon the board of county commissioners?

The defendants in error contend that the individual trustees are public officers, and that, therefore, the very essential part of the act which provides for their appointment necessarily constitutes them county officers, and on this account it should be declared void. In opposition to this contention we are reminded that the individual trustees have no authority as such, and that it is only as a board that they have recognition. In a brief submitted on behalf of the plaintiff in error it is said: "We insist that this act creates a new

and independent municipal corporation. It is not a city or county corporation, but one wholly distinct from either, etc. * * * The act does not in any way abridge or curtail any of the rights of the counties heretofore existing, or the right of any of its officers, or does not amend or conflict with any of the provisions of the statute heretofore existing regarding counties." In another brief submitted on behalf of the plaintiff in error occurs the following language: "There is an important feature of the canal act which ought to be considered in this connection. The board of canal trustees when duly organized are to become, in law and equity, a corporation. No one of the trustees fills any office except as a member of the board. The board itself—the corporation—is the agency of the state to carry into effect the purposes of the act." From these definitions and limitations, if accepted as correct, it would necessarily result that by an act of the legislature a method had been provided whereby a corporation, consisting of five private citizens, may be created. It is idle to insist that this board of trustees, when organized, can be a municipal corporation in any sense. The following definition of the term "municipal corporation" is given by an eminent writer upon that subject: "We may therefore define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal

corporation proper." (1 Dillon, Municipal Corporations, sec. 20.) "A municipal corporation is a subordinate branch of the government of state." (*Mayor of Nashville v. Ray*, 19 Wall. [U. S.], 475.)

In argument no claim has been founded upon the use of the term "body politic," also used as a part of the description of the board of trustees contemplated in the act, and we apprehend that none properly could be. We must, therefore, deal with the board as a corporation having no municipal attributes, and of which no municipal duties can be required. It is provided in section 1, article 11, of the constitution of Nebraska, under the head of "Miscellaneous Corporations," as follows:

"Section 1. No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created."

Under this provision of the constitution there was in existence before this act was passed a general law which provided how corporations composed of and managed solely by private citizens must be created. Previous to the commencement of business, corporations within the class indicated were required to adopt and file for record articles of incorporation, and to publish notice of the name, the place, and the nature of their business, the amount of capital stock, the time of commencement and termination, to what amount they might become indebted, and by what officers their affairs should be managed. It can scarcely be claimed by the plaintiff in error that "The Board

of Canal Trustees" can be a "corporation designed for either charitable, educational, penal, or reformatory purposes," and yet its creation is provided for by an act which in no way refers to the general incorporation law which is to be found in chapter 16, Compiled Statutes. This method of amending statutes already in existence is unquestionably in violation of the provision in section 11, article 3, of said constitution that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." (*Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409; *Stricklett v. State*, 31 Neb., 674; *Trumble v. Trumble*, 37 Neb., 340.) For the sake of the argument, if it should be conceded to the contention of the plaintiff, that the board of trustees duly organized becomes a municipal corporation, the above considerations would still have the same force, the difference being merely that the amendatory act invades the field of legislation governing municipal as distinguished from ordinary corporations. The right of eminent domain, by the provisions of the act, was delegated directly to the board of trustees as such, and the title of the property acquired by its exercise, or in any other way, for the construction and operation of a canal, is to be held by the board of trustees in its corporate capacity. The title of this act is "An act enabling counties * * * to issue bonds to construct, own, and operate canals, * * * and to acquire right of way and land for such purposes, and to provide for the appointment of a board of trustees to carry into effect the purposes of this act, and to levy taxes to pay the same and the interest thereon," etc. Of these enumerated pur-

poses, the power to issue bonds and the power to levy taxes for the payment of the principal and interest thereof are contained in the body of the act without question. In a certain sense, perhaps, the provision in the title for the appointment of a board of trustees to carry into effect the provisions of this act finds response in the provisions of the bill which turn over to said board the whole property as it is acquired or constructed. But it is believed that no power of construction is adequate to the task of demonstrating that the powers of a county to own and operate canals, and to acquire and hold land for such purposes, as provided in the above title, are at all met by providing in the bill itself that such powers shall be vested in a specially created distinct corporation, even though municipal, independent of the county as well as of its officers and taxpayers. The title of the bill is therefore misleading as to a part of the act, without which its purpose could not be accomplished, and since this part of the subject is not clearly expressed in the title, as required by section 11, article 3, of the constitution of this state, no part of the act can be sustained. (*Ives v. Norris*, 13 Neb., 252; *State v. Ream*, 16 Neb., 681; *Trumble v. Trumble*, 37 Neb., 340.) The judgment of the district court is

AFFIRMED.

NORVAL, J., HARRISON, J., and RAGAN, C., concur in result.

IRVINE, C., not sitting.

POST, C. J., dissenting.

STATE OF NEBRASKA V. JOHN E. HILL ET AL.

FILED MARCH 5, 1896. No. 6952.

1. **Action on State Treasurer's Bond: FAILURE TO TURN OVER FUNDS.** In an action on a treasurer's bond the breaches especially alleged were, that there had been a failure to turn over to his successor a certain sum which it was alleged the outgoing treasurer had in a certain bank when his term of office expired. By answer it was alleged that the outgoing treasurer had turned over to his successor evidence of indebtedness of the same character as those which had formed the basis of liability of the bank to himself to an amount equal to that for which he was sought to be held. By reply, it was, in effect, admitted that the outgoing treasurer had turned over to his successor all choses in action that he had received as treasurer, in like forms of evidence of indebtedness with those which he had received, but it was averred that such payment was ineffectual to release the outgoing treasurer because, as insisted by the plaintiff, nothing but cash could be treated as payment. *Held*, That, under this condition of the issues, and under proofs consistent with the theory of each contending party, it was a question of fact for the jury to determine how much actual money had been received and paid, and that its verdict, being founded upon sufficient evidence, must stand. Per RYAN, C. IRVINE and RAGAN, CC., concur.
2. **Official Bonds: DELIVERY: PLEADING.** Where the petition alleges the delivery of the official bond declared on, the allegation in the answer of a surety,—following an averment therein that he signed upon condition the principal should also sign,—that "if it [the bond] was ever delivered, it was done in violation of the express condition aforesaid upon which defendant signed said instrument," must be treated as a substantial admission of the delivery of the bond. Per NORVAL, J. All concurring.
3. ———: ———. Whether the sureties in an official bond are liable where the principal therein named has failed to sign it before its acceptance and approval, *quære*. Per NORVAL, J.

4. ———: EXECUTION: SIGNATURE OF PRINCIPAL. When a state officer elect writes his name in the body of a paper prepared by himself as his official bond, and subscribes his oath of office indorsed thereon, which instrument is delivered, accepted, and approved as his official bond, the same is valid and binding upon the principal and his sureties, even though such officer inadvertently omitted to attach his final signature at the bottom of the bond. Per NORVAL, J. All concurring.
5. **Treasurers: TURNING OVER PUBLIC FUNDS: CERTIFICATES OF DEPOSIT.** Prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in bank, the payment of money in the hands of a state or county treasurer, at the termination of his term of office, to his successor, could be effectuated alone by the delivery of that which the law of the land recognized as money. The mere delivery and acceptance of certificates of deposit issued by a bank—upon which no money has been realized—is not such a payment as will release the outgoing officer. *Cedar County v. Jenal*, 14 Neb., 254, adhered to. Per NORVAL, J.
6. ———: ACCEPTANCE OF CERTIFICATES OF DEPOSIT: RATIFICATION BY STATE. Although a state treasurer has no right to receive in payment of the public revenues anything but money, yet if he chooses to do so, the state may ratify the act, in which case he and his sureties are chargeable as for money, and must make good the amount. Per NORVAL, J.
7. ———: ———: ———. The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank. Per NORVAL, J. HARRISON, J., concurring.
8. ———: ———: ———. *Held*, That the record discloses such a ratification in this case. Per NORVAL, J. HARRISON, J., concurring.
9. **Payment: APPLICATION.** When partial payments have been made on a running account, the debtor has the right to direct their application, but if he fails to do so the creditor may make the application, and where neither of them has made any appropriation before suit is brought, the law will apply such payments according to their priority of time; that is, the first item on the

debit side is discharged or reduced by the first item on the other side of the account. Per NORVAL, J.

10. **New Trial: INSTRUCTIONS: HARMLESS ERROR.** A verdict will not be set aside for error in instructions, when it is manifest that no other verdict should have been returned under the evidence. *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732, followed. Per NORVAL, J. All concurring.
11. **Embezzlement.** It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled, by an adverse use or holding. (*Chaplin v. Lee*, 18 Neb., 440.) Per Post, C. J. All concur.
12. ———: **OFFICERS: LOANING PUBLIC MONEY.** So much of section 124, Criminal Code, 1873, defining embezzlement of public funds, as provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds "shall loan, with or without interest, * * * any portion of the public money, * * * every such act shall be deemed * * * an embezzlement of so much of the said moneys * * * as shall be thus * * * loaned" (General Statutes, 1873, p. 749, sec. 124), was intended to prevent the unlawful use by officers, and others with their knowledge and consent, of money committed to their custody, and not as an amendment of existing statutes regulating the means of preserving and accounting for of public funds. Per Post, C. J. HARRISON, J., RYAN, RAGAN, and IRVINE, CC., concurring.
13. ———: ———: **DEPOSITS OF PUBLIC FUNDS: LOANS.** The term "loan" is thus employed in a restricted sense, and includes those transactions only in which the conventional relation of borrower and lender exists, and has no application to the deposit in bank, for safe-keeping, of public funds by the custodian thereof who so far retains his control over them that they may be by him at any time reclaimed. Per Post, C. J. RYAN and RAGAN, CC., concurring.
14. **Commercial Paper: PUBLIC FUNDS: OFFICERS.** In the absence of statutory restriction upon the subject, the method employed in the monetary transactions of the world by which payments are made, and charges and credits adjusted, through the agency of checks, drafts,

and certificates of deposit, is so far applicable to custodians of public funds in this state as to render them liable for remittances by that means made and received, provided such instruments be in good faith tendered and accepted as payment and not for collection and credit at the debtor's risk. Per Post, C. J. RYAN, RAGAN, and IRVINE, CC., concurring.

15. **Definition of "Money."** The word "money" is a generic term, and may include not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. (*State v. McFetridge*, 84 Wis., 473.) Per Post, C. J. RYAN, RAGAN, and IRVINE, CC., concurring.
16. **State Treasurer: TURNING OVER FUNDS: PAYMENT: ACCEPTANCE OF CHECKS.** A state treasurer who on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank. Per Post, C. J. HARRISON, J., RYAN, RAGAN, and IRVINE, CC., concurring.
17. ———: ———: ———: ———: **SETTLEMENT.** Such a transaction, if in good faith by both parties, amounts to a settlement within the meaning of the statute, which will, to the extent of the payment so made, relieve the retiring treasurer, since the state is not entitled to concurrent remedies upon the bonds of successive officers to enforce the same liability, and whatever is in such case sufficient in law to charge the incumbent will operate *per se* to discharge his predecessor. Per Post, C. J. RYAN and RAGAN, CC., concurring.
18. **Stare Decisis.** Where a line of decisions, although erroneous, has become a rule of property it should be adhered to until changed by statute; but in the absence of complications resulting from property rights it is the undoubted privilege, if not indeed the duty, of courts to re-examine questions, and modify or overrule previous decisions shown to be fundamentally wrong. Per Post, C. J. All concur.

19. ———: LIABILITY OF TREASURERS. *State v. Keim*, 8 Neb., 63, *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431, and *Cedar County v. Jenal*, 14 Neb., 254, criticised. *State v. Hill*, 38 Neb., 698, distinguished.
20. **Liability of Treasurers: CERTIFICATES OF DEPOSIT.** Whether the doctrine of *Cedar County v. Jenal*, 14 Neb., 254, extends to a case where a treasurer has accepted certificates of deposit from his predecessor, doubted. Per IRVINE, C.
21. ———: DEPOSITORY LAW: NOVATION. The deposit by Hill's successor, under the depository law, of the certificates received by him from Hill, in the same bank which issued them, the cancellation of the certificates and the state's accepting a credit on open account for their amount operated a novation, made the bank the state's debtor, and released Hill from liability. Per IRVINE, C. HARRISON, J., and RYAN and RAGAN, CC., concur.

ORIGINAL action in the supreme court to recover from defendants upon the official bond of John E. Hill for his second term as state treasurer, the sum of \$236,364.62. There was a trial to a jury, resulting in a verdict for defendants. Heard on motion of the state for a new trial and on motion of defendants for judgment on the verdict. *New trial denied and judgment entered in favor of defendants.*

Omitting the justifications of the sureties, the bond upon which the action is based and the oath of office attached thereto are as follows, the italicized words in the bond being in the handwriting of John E. Hill, whose signature does not appear at the end of the instrument:

"Know all men by these presents, that we, *John E. Hill*, as principal, and Charles W. Mosher, D. E. Thompson, J. D. Macfarland, Richard C. Outcalt, John Fitzgerald, J. E. Smith, S. C. Smith, John Ellis, C. T. Boggs, N. S. Harwood, Frank

Colpetzer, V. B. Caldwell, Saml. E. Rogers, John F. Coad, as sureties, are held and firmly bound unto the state of Nebraska in the sum of *two million* dollars, for the payment of which, well and truly to be made unto the state of Nebraska, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents; sealed with our seals and dated this — day of December, A. D. 1890.

"The conditions of this bond are these: Whereas, at the last general election held within and for the state of Nebraska, the above bounden *John E. Hill* was duly elected to the office of *treasurer of the state of Nebraska* for the term of two years from the 8th day of January, A. D. 1891:

"Now, if the said *John E. Hill* shall well and truly, in all things, perform the duties of *treasurer of the state of Nebraska* for the state of Nebraska during the continuance of his term of office, as provided by law, then the above obligation to be void, otherwise to be and remain in full force and effect.

"CHARLES W. MOSHER.....	\$300,000 00
"D. E. THOMPSON.....	150,000 00
"J. D. MACFARLAND.....	200,000 00
"RICHD. C. OUTCALT.....	150,000 00
"JOHN FITZGERALD	400,000 00
"J. E. SMITH	100,000 00
"S. C. SMITH.....	100,000 00
"JOHN ELLIS	100,000 00
"C. T. BOGGS	100,000 00
"N. S. HARWOOD.....	100,000 00
"FRANK COLPETZER.....	100,000 00
"V. B. CALDWELL	100,000 00
"SAML. E. ROGERS.....	200,000 00
"JOHN F. COAD.....	200,000 00
"JOHN H. MCCLAY.....	50,000 00
"JOHN B. WRIGHT.....	50,000 00

"STATE OF NEBRASKA, }
COUNTY OF LANCASTER. }

"I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Nebraska, and will faithfully discharge the duties of state treasurer of the state of Nebraska according to law, and the best of my ability; and that at the election at which I was chosen to fill said office I did not improperly influence in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office for any official act or influence.

JOHN E. HILL.

"Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1891.

"AMASA COBB,
"Chief Justice."

[Indorsed:] "Official Bond. J. E. Hill, State Treasurer. Approved this 8th day of January, A. D., 1891. James E. Boyd, Governor of Nebraska. Approved this 8th day of January, A. D. 1891. John M. Thayer, Governor."

"STATE OF NEBRASKA, }
SECRETARY'S OFFICE. } ss.

"Received and filed for record this 8th day of January, A. D. 1891, and recorded in Book "C," Bond Record Incorporations, at page 283.

"JOHN C. ALLEN,
"Secretary of State."

See opinions by RYAN, C., and NORVAL, J., for statement of the case.

The court instructed the jury as follows:

"1. By this action the state of Nebraska, as plaintiff, seeks to recover from J. E. Hill, as principal, and the other defendants, as sureties, on the official bond of the said Hill as treasurer of Nebraska for the term ending in January, 1893. Several questions have been controverted during the trial, although your inquiry will be confined to those issues to which your attention is especially directed by this charge, all others presenting questions of law for which the court is alone responsible.

"2. By taking the oath of office, procuring his official bond to be approved, holding the office of state treasurer and enjoying the emoluments thereof during the entire term, the defendant Hill is estopped to deny his liability on said bond, and such estoppel applies with equal force to the other defendants—his sureties.

"3. It is undisputed that Hill, at the close of his last term of office, indorsed and turned over to Joseph S. Bartley, his successor, in settlement, three certificates of deposit of the Capital National Bank aggregating \$285,357.85, upon which the state has since realized \$48,993.23, and no more. This suit is to recover \$236,364.62, the difference between said sums, the state claiming that the receiving of said certificates by Bartley did not constitute a payment except for the said amount actually realized thereon. The uncontradicted evidence further discloses that Hill, as state treasurer, at the end of his first term had taken credit with the Capital National Bank upon open account the sum of \$177,489.84, and also held certificates of deposit issued by said bank aggre-

gating \$90,000. The defendants contend that a part, if not all, of these credits was carried through his second term and merged into the certificates of deposit turned over by Hill to Bartley, claiming they are not liable in this suit for the amount of Hill's credit with said bank at the commencement of his second term, save to the extent that he may have converted the same into money.

"4. You are instructed that the payment of money in the hands of a state or county treasurer at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. The mere delivery of certificates of deposit issued by a bank upon which no money is realized is not a payment.

"5. It follows from the foregoing rule that the defendants are not chargeable in this action for the amount of the defendant Hill's credit as state treasurer with the Capital National Bank at the commencement of his second term, whether represented by certificates of deposit or open bank account, except for the money, if any, subsequently realized thereon by Hill.

"6. The burden of proof is upon the state to show affirmatively the amounts with which the defendant Hill is chargeable, and these amounts are dependent upon the aggregate sums of money actually received by him during his second term.

"7. The evidence shows a continuous course of dealing between Hill and the Capital National Bank during the second term of the former as state treasurer, and the contention of the state is that the first withdrawals by him in point of time should be applied in discharge of the amount of his credits at the commencement of said term.

Hill, on the other hand, in effect, contends that his intention was at all times to withdraw the money last deposited, and that the transaction in evidence should be so construed. Should you find that there was an agreement or understanding between Hill and the bank with respect to the application of withdrawals by him, such agreement is binding upon the parties to this action. If, however, no such understanding existed, it is the right of the defendant Hill to direct the application to be made of such withdrawals, and it is not within the power of the state to make another or different application thereof.

"8. If the defendant Hill has fully accounted for and paid over all moneys belonging to the state which came into his hands during the period covered by the bond in suit, your verdict should be for the defendants. If Hill has not so accounted, then your verdict should be for the state for the amount disclosed by the evidence that he has received and not paid over, with seven per cent interest thereon from January 14, 1893, to the first day of the present term, to-wit, September 17, 1895."

In addition to the general verdict for defendants, a special verdict was returned under the directions of the court, the substance of which is set out in the opinion by NORVAL, J.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, for the state, E. Wakeley and G. M. Lambertson, of counsel:

The sureties are liable even if Treasurer Hill did not execute the bond. (*United States v. Linn*, 15 Pet. [U. S.], 290; *State v. Bowman*, 10 O., 445;

Trustees v. Sheik, 119 Ill., 579; *Williams v. Marshall*, 42 Barb. [N. Y.], 524; *Parker v. Bradley*, 2 Hill [N. Y.], 584; *Haskins v. Lambard*, 4 Shep. [Me.], 140; *Scott v. Whipple*, 5 Greenl. [Me.], 336; *Keyser v. Keen*, 17 Pa. St., 327; *Johnson v. Weatherwax*, 9 Kan., 75.)

The name John E. Hill, written by him in the body of the bond, is a sufficient execution on his part. (*Taylor v. Dobbins*, 1 Strange [Eng.], 399; *Saunderson v. Jackson*, 2 Bos. & Pul. [Eng.], 238; *Schneider v. Norris*, 2 Maule & Selw. [Eng.], 286; *Morison v. Turnour*, 18 Ves. Ch. [Eng.], 175; *Bleakley v. Smith*, 11 Sim. [Eng.], 150; *Merritt v. Clason*, 12 Johns. [N. Y.], 102; 1 Brandt, Suretyship & Guaranty, p. 151; *Clason v. Bailey*, 14 Johns. [N. Y.], 484; *Davis v. Shields*, 26 Wend. [N. Y.], 341; *Commonwealth v. Ray*, 3 Gray [Mass.], 441; *Penniman v. Hartshorn*, 13 Mass., 87; *Schmidt v. Schmaelter*, 45 Mo., 502; *Wise v. Ray*, 3 Greene [Ia.], 430; *McConnell v. Brillhart*, 17 Ill., 354; *Barry v. Coombe*, 1 Pet. [U. S.], 640; *Palmer v. Grant*, 4 Conn., 389; *Rhode v. Louthain*, 8 Blackf. [Ind.], 413; *Quin v. Sterne*, 26 Ga., 223; *Drury v. Young*, 58 Md., 546; *McLeod v. State*, 13 So. Rep. [Miss.], 268; 1 Brandt, Suretyship & Guaranty, p. 89; *Argenbright v. Campbell*, 3 Hen. & M. [Va.], 144.)

Hill having exercised the duties of the office of state treasurer, under the bond and oath of office is estopped from claiming that he did not execute the bond. (*McNitt v. Turner*, 16 Wall. [U. S.], 363; *Carpenter v. Rannels*, 19 Wall. [U. S.], 146; *Apthorp v. North*, 14 Mass., 167; *Bank of United States v. Dandridge*, 12 Wheat. [U. S.], 64; *Milttenberger v. Schlegel*, 7 Barr. [Pa.], 240; *People v. Johr*, 22 Mich., 465; *Wright v. Leath*, 24 Tex., 32; *Broome v. United States*, 15 How. [U. S.], 155; *Bartlett v. Board of*

Education, 59 Ill., 367; *Bowman v. Griffith*, 35 Neb., 361.)

The law presumes the delivery of an instrument found in the custody of the officers created by law for its safe-keeping. (1 Devlin, Deeds, sec. 294; *Dedham Bank v. Chickering*, 20 Mass., 335; *McLean v. State*, 8 Heisk. [Tenn.], 23; *Bryan v. City of Des Moines*, 51 Ia., 590; *Boggs v. Olcott*, 40 Ill., 304; *City of Portland v. Besser*, 10 Ore., 243; *Coons v. People*, 76 Ill., 383; *State v. McAlpin*, 4 Ired. Law [N. Car.], 148; *State v. Ingram*, 5 Ired. Law [N. Car.], 442; *Daniels v. Tearney*, 102 U. S., 415; *State v. Mitchell*, 31 O. St., 592; *Pritchett v. People*, 1 Gilm. [Ill.], 525; *Alley v. Adams County*, 76 Ill., 101; *People v. Murray*, 5 Hill [N. Y.], 468; *Ferguson v. Landram*, 5 Bush [Ky.], 230; *United States v. Hodson*, 10 Wall. [U. S.], 395; *Motz v. City of Detroit*, 18 Mich., 526; *McCracken v. Todd*, 1 Kan., 148; *Hyde v. Baldwin*, 17 Pick. [Mass.], 305; *Jacobs v. Miller*, 50 Mich., 119; *Scholey v. Rew*, 23 Wall. [U. S.], 331; *Cowell v. Colorado Springs Co.*, 100 U. S., 55; *McClure v. Commonwealth*, 80 Pa. St., 167; *Perryman v. City of Greenville*, 51 Ala., 507; *Walker v. Mulvean*, 76 Ill., 18; *McCauley v. State*, 21 Md., 556; *Williamson v. Woolf*, 37 Ala., 298; *McClure v. Colclough*, 5 Ala., 65; *Byers v. McClanahan*, 6 Gill & J. [Md.], 250; *Brown v. Murdock*, 16 Md., 201; *Hoffmire v. Holcomb*, 17 Kan., 378; *Smith v. Smith*, 14 Gray [Mass.], 532; *Harbin v. Bell*, 54 Ala., 389; *Bank of St. Marys v. Powers*, 25 Ala., 566; *State v. McDonald*, 40 Pac. Rep. [Idaho], 312; *Iredell v. Barbee*, 9 Ired. Law [N. Car.], 250; *Murfree, Official Bonds*, 436, 437.)

A public officer and his bondsmen are absolutely liable for all public moneys received, and for which he is accountable, regardless of the fail-

ure of banks in which the funds are deposited, of worthless paper received as money, of theft, robbery, or unavoidable loss. (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818; *State v. Hill*, 38 Neb., 698; *United States v. Prescott*, 3 How. [U. S.], 587; *United States v. Morgan*, 11 How. [U. S.], 160; *United States v. Dashiell*, 4 Wall. [U. S.], 185; *Muzzy v. Shattuck*, 1 Den. [N. Y.], 233; *Commonwealth v. Comly*, 3 Pa. St., 372; *State v. Harper*, 6 O. St., 607; *State v. Bartley*, 39 Neb., 353; *Inhabitants of Town of Hancock v. Hazzard*, 12 Cush. [Mass.], 112; *Halbert v. State*, 22 Ind., 125.)

The appointment of the Capital National Bank as a state depository after the expiration of Treasurer Hill's term of office did not release him and his sureties from the liability that had already accrued on the bond.

There has been no ratification by the state of the deposits made by Hill in the Capital National Bank.

The sureties on the bond are bound by the admissions of Hill and by entries in the book made by him in the line of his official duties. Such admissions are part of the *res gestæ*. (*Barry v. Screwmen's Benevolent Association*, 67 Tex., 250; *Northumberland v. Cobleigh*, 59 N. H., 250; *Bank of Brighton v. Smith*, 12 Allen [Mass.], 243; *Placer County v. Dickerson*, 45 Cal., 12; *Atlas Bank v. Brownell*, 9 R. I., 168; *Blair v. Perpetual Ins. Co.*, 10 Mo., 567; *Drummond v. Prestman*, 12 Wheat. [U. S.], 515; *Wilson v. Green*, 25 Vt., 450; *Middleton v. Melton*, 10 B. & C. [Eng.], 317; *Pendleton v. Bank of Kentucky*, 1 T. B. Monroe [Ky.], 171; *Morley v. Town of Metamora*, 78 Ill., 394; *Dobbs v. Justices*, 17 Ga., 624; *Casky v. Hariland*, 13 Ala., 314.)

A debtor paying money has the right to direct its application. If he omits to do so, the creditor may make the application at any time before a controversy arises. (*Robinson v. Doolittle*, 12 Vt., 246; *Pierce v. Knight*, 31 Vt., 701; *Taylor v. Coleman*, 20 Tex., 772; *Poulson v. Collier*, 18 Mo. App., 583; *Callahan v. Boazman*, 21 Ala., 246; *Whetmore v. Murdock*, 3 W. & M. [U. S. C. C.], 390.)

After controversy arises neither debtor nor creditor has the right to make an appropriation of payments. (*Lazarus v. Friedheim*, 11 S. W. Rep. [Ark.], 518; *Milliken v. Tufts*, 31 Me., 497; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720; *Applegate v. Koons*, 74 Ind., 247; *Wendt v. Ross*, 33 Cal., 650; *Thurlow v. Gilmore*, 40 Me., 378; *Jones v. United States*, 7 How. [U. S.], 684; *Harrison v. Johnston*, 27 Ala., 445; *Longan v. Taylor*, 130 Ill., 412; *Dall v. People*, 34 N. E. Rep. [Ill.], 413; *McCune v. Belt*, 45 Mo., 174; *Hersey v. Bennett*, 9 N. W. Rep. [Minn.], 500.)

J. H. Broady, for defendant Hill:

The early Nebraska cases should not be followed, but are distinguishable from the case at bar.

The case of *Cedar County v. Jenal*, 14 Neb., 254, is not analogous. In that case the certificate offered in payment as money never went beyond the control of the payor, never was accepted, indorsed, and delivered by the payee to the bank, nor did the payee ever receive credit at the bank subject to check, nor check any part of it out. A striking feature of the decision in that case is that there is no authority whatever cited except section 124 of the Criminal Code, nor is there any

discussion of the principles of law of embezzlement.

State v. Sheldon, 10 Neb., 452, is quite peculiar. It was an action of *quo warranto* to determine who was treasurer of Greeley county. The second paragraph of the syllabus is in these words: "The fact that the public funds have been stolen from the treasury is no legal justification for the failure of the treasurer to account for them;" and yet the opinion truly states all there was in the case in this language: "Two questions are to be determined in this case: First—The right of the board of county commissioners to summarily remove the treasurer from office without giving him an opportunity to make a defense. Second—Must a judgment of ouster be entered?" So it appears that paragraph 2 of the syllabus was a matter not in the case nor necessary to its decision. It is therefore only a *dictum* of the court outside the case and not an authority as such. The same peculiarity applies to this case as to the other, that it neither cites any authority nor discusses principles of law upon which to base the second paragraph of the syllabus.

In *State v. Keim*, 8 Neb., 63, counsel for plaintiff contended that the ownership of state funds was in the state, saying in their brief that the statutes stamped the ownership of public funds in the state. Counsel for defendant in error contended: "The money which he [treasurer] receives becomes his own money and he is liable absolutely for it to the state, on his official bond." The decision of affirmance, based upon section 124 of the Criminal Code, says: "It is true that although such loaning or depositing of the public money was unauthorized and contrary to

the spirit and policy of our government, yet after it was done in point of fact, it could be ratified by the state." The same peculiarity runs through this case, and on the question of whether the treasurer or the state is the owner of the public funds, and on the question of embezzlement, it cites no authority except the statute, nor does it discuss legal principles; but this decision, as well as all of them, is based upon section 124 of the Criminal Code. Their logic is that putting in the bank to the credit of the state, without any actual conversion on the part of the treasurer or any want of good faith, was an embezzlement; that actual conversion, bad intent, or want of diligence are all immaterial. No wonder there were no citations nor discussions of legal principles to sustain such a theory! But the turning point of the case being embezzlement, shows that the court intended to hold in this case as well as in the others that the treasurer was not the owner of the funds, but that the state is the owner; that the treasurer was not a debtor, but a bailee of the funds; and yet, by a process of reasoning we fail to understand, or principles of law to us entirely new, they hold that the owner cannot recover the property. They hold that it is a bailment, but they deprive the owner of the rights he has in other sorts of bailments, or the rights the beneficiary has in other sorts of trusts. The same criticism applies to *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431.

In support of an argument on the proposition that the depositing of the money in the Capital National Bank by defendant Hill did not make him liable for the loss, reference is made to the following authorities: *Gray v. Havemeyer*, 3 C. C.

A., 497; *Estate of Law*, 144 Pa. St., 499; *State v. Gates*, 67 Mo., 139.

Hill's term, by law, ceased January 5, 1893. At that time the state depository law took effect. Because of the delay of the legislature in canvassing the election returns, Bartley could not qualify until January 14. For this reason Hill continued, at least *de facto*, in office and held things *in statu quo* from January 5 to January 14. In the meantime the new statute was in force recognizing the banks of the state as a better place to keep state funds, and recognizing and making the treasurer the agent of the state to so deal with the banks and with the public funds accordingly. From January 5, 1893, until January 14, Hill was, at least *de facto*, treasurer, and was such agent of the state; and after January 14, 1893, Bartley was such agent. The actions of both as to the deposits in the Capital National Bank were the actions of the state, and moreover the making of that bank a state depository by the state according to law, and putting the funds therein and taking the credit for that money in the Capital National Bank as a state depository, again ratified the same, which ratification related back to the beginning of the transaction that led to and culminated in such credit to the state under the state depository law. It was a waiver of wrongs or irregularities, if any, in the prior stages of the proceedings, and was therefore an estoppel against urging them in this cause. (*State v. Gates*, 67 Mo., 139; *People v. Stephens*, 71 N. Y., 527; *Clark v. Stanley*, 66 N. Car., 59; *Throop, Public Officers*, secs. 3, 21, 551.)

Charles O. Whedon, for the sureties:

It is alleged in the answer that the defendants who are sued as sureties signed the instrument sued on upon the express condition that it should not be delivered to the obligee until it had been signed by the principal therein named,—the defendant Hill, whose name appears in the body of the bond as principal. It is further alleged that said Hill never signed said instrument, and that it was never delivered with the knowledge or consent of the defendants sought to be held as sureties, and if it was ever delivered it was against the consent of said defendants and in violation of said condition. These alleged facts constitute a defense. (*Board of Education v. Sweeney*, 48 N. W. Rep. [S. Dak.], 302; *Johnston v. Kimball Township*, 39 Mich., 187; *Hall v. Parker*, 39 Mich., 287; *Green v. Kindy*, 43 Mich., 279; *Wells v. Dill*, 6 Martin [La.], 665; *State v. Austin*, 35 Minn., 51; *Duncan v. United States*, 7 Pet. [U. S.], 448; *Bunn v. Jetmore*, 70 Mo., 228; *Bean v. Parker*, 17 Mass., 591; *Wood v. Washburn*, 2 Pick. [Mass.], 24; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass., 460; *State Bank v. Evans*, 15 N. J. Law, 155; *Hall v. Parker*, 37 Mich., 590; *Fletcher v. Austin*, 11 Vt., 447; *Hessell v. Johnson*, 63 Mich., 623; *Russell v. Annable*, 109 Mass., 72; *Bibb v. Reid*, 3 Ala., 88; *Pepper v. State*, 22 Ind., 399; *Allen v. Marney*, 65 Ind., 398; *Wild-Cat Branch v. Ball*, 45 Ind., 213.)

The fact that the name of Hill appeared in the instrument as principal, and that at the time it came into the possession of the governor of the state his name was not signed thereto as principal, shows that the instrument was incomplete, and that was sufficient notice to the obligee therein

named, and the best notice that could have been given, that the principal named was to sign the instrument before delivery. (*Hall v. Smith*, 14 Bush [Ky.], 606; *Sharp v. United States*, 4 Watts [Pa.], 21; *Fletcher v. Austin*, 11 Vt., 447; *Dair v. United States*, 16 Wall. [U. S.], 1.)

If there is anything on the face of the bond to apprise the obligee that the bond has been delivered by the sureties upon a condition not complied with, the sureties may plead the failure as a defense to the action. (*Cutler v. Roberts*, 7 Neb., 4; *Gray v. School District*, 35 Neb., 446.)

These defendants were under no legal or moral obligation to see that the principal had signed the instrument. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see that a proper bond was executed, and to dismiss all oversight of it. (*Fletcher v. Leight*, 4 Bush [Ky.], 303.)

A statute of Wisconsin required the treasurer to keep his office at the capitol, to receive and have charge of all money paid into the state treasury, and pay the same out as provided by law. The governor and attorney general of that state were required at least once each quarter year to examine and see that all the money appearing on the books of the treasurer and secretary of state as belonging to the state was in the vaults of the treasury. The statute also made it *prima facie* evidence of embezzlement of the public funds if the treasurer should loan or deposit the same for his own gain or advantage without special authority. The statute contained this provision: "Every public officer shall promptly pay over, as required by law, the same moneys received and held by him by virtue of his office." Construing

these provisions of the statute, the supreme court of Wisconsin held (1) that the deposit of public moneys in banks by the state treasurer in the name of his office, payable at any time, but only upon his official draft, was not unlawful; nor was it unlawful for him to stipulate for and receive interest on such deposits; (2) that such deposits, having been made in accordance with long-continued usage and for convenience in the transaction of the business of his department, were not made for gain, profit, or advantage to the treasurer within the meaning of the statute making such deposit by a public officer for his own gain, profit, or advantage *prima facie* evidence of embezzlement; (3) that the treasurer was not, by the statute, required to pay the identical moneys by him received as such officer, but money having the same value and essential qualities as that paid into the treasury; (4) that the certificates of deposit or other vouchers for money deposited in solvent banks, payable on demand, were money within the meaning of the statute requiring the governor and attorney general from time to time to see that all money belonging to the several funds was in the vaults of the treasury; (5) that a deposit of public funds in banks subject to draft at any time was not an investment for such funds prohibited by statute. (*State v. McFetridge*, 84 Wis., 473.)

It is a fact admitted by the pleadings that the custom and usage of receiving, depositing, and paying out the public funds as stated in the answer had obtained in this state since its organization and that such custom and usage were known of all men, the courts, and the legislature. It would be practically impossible to transact public

business in any other way. The state has provided no place in which the large amount of money which comes into the hands of the treasurer can be safely kept. It is not the policy of the state that money which is paid as taxes shall be locked up in a vault and withdrawn from circulation. The state holds a large amount of bonds which belong to the permanent school fund. These securities have been kept in the vault in the office of the state treasurer, where they were insecure. Because of the danger of their being stolen, the legislature in 1887 passed an act requiring that all such bonds should be stamped with the words, "This bond belongs to the permanent school fund of the state of Nebraska, and is not negotiable," which statement the state treasurer is required to sign. (Session Laws, 1887, ch. 79, p. 614.) The title of the act expresses the fear that said securities might be lost by theft or otherwise, and to prevent their negotiability the act was passed. No precaution has been taken by the state to prevent the stealing of money of the state from the vault of the treasury, because it was known that the money was not kept in the vault. It has never been supposed that the treasurer would keep the money which he received in his office. It is impossible that a treasurer who followed the custom of depositing public funds in a bank for safe-keeping,—a custom which had been followed for thirty years,—should be convicted of embezzlement for making such deposit, especially in view of the fact that the state had furnished no safe place for keeping such funds. As to the question of custom and usage reference is made to the case of *Slidell v. Grandjean*, 111 U. S., 413.

By the giving of the depository bond, its approval by the proper officers, and the filing thereof with the auditor, a contract was entered into between the state and the bank, and the depositing of the certificates in the bank was in part performance of that contract. By the terms of this contract the bank became entitled to receive on deposit current funds of the state to an amount not exceeding one-half the amount of the bond, which funds should be subject to the check of the treasurer, and the amount on deposit might be increased or diminished as the treasurer might determine. On its part the bank became liable to pay to the state interest on the funds deposited at the rate of three per cent per annum on daily balances, interest payable quarterly. The terms of this contract are not only found in the act of 1891, but they are embodied in the bond given by the bank. There is no contention that the requirements of the act of 1891 were not complied with in the giving of the bond, its form, approval, or filing. It is admitted that the deposit was not made until after the bond had been approved and filed. The state is bound by this contract. (*People v. Stephens*, 71 N. Y., 527; *Sholes v. State*, 2 Chand. [Wis.], 182; *Metzel v. State*, 16 Wis., 370; *State v. Dennis*, 39 Kan., 509; *Danolds v. State*, 89 N. Y., 36; *United States v. Bank of Metropolis*, 15 Pet. [U. S.], 377; *Carr v. State*, 11 L. R. A., 370; *Georgia Penitentiary Cos. v. Nelms*, 71 Ga., 301; *Fletcher v. Peck*, 6 Cranch [U. S.], 88; *Hall v. Wisconsin*, 103 U. S., 5; *Davis v. Gray*, 16 Wall. [U. S.], 232; *Curran v. Arkansas*, 15 How. [U. S.], 308; *Abel v. Culberson*, 56 Fed. Rep., 329; *State v. Flint & P. M. R. Co.*, 89 Mich., 481; *Houston v. Cook*, 153

Pa. St., 43; *Sheets v. Selden's Lessee*, 2 Wall. [U. S.], 177; *Hodgson v. Dexter*, 1 Cranch [U. S.], 345.)

John H. Ames, also for sureties:

The statutes of this state (Compiled Statutes, sec. 12, ch. 10) enact: "All official bonds shall be obligatory upon the principal and sureties for the faithful discharge of all the duties required by law of such principal." The condition of the bond in suit is that "the said John E. Hill shall well and truly in all things perform the duties of treasurer of the state of Nebraska" during his term of office. These are the usual terms of the ordinary common law bond, such as is customarily given by trustees, receivers, executors, and administrators, and the language of the statute is conclusive of the legislative intent that the liability of the treasurer and his sureties shall be the common law liability of such trustees and officers. It is in effect the same as though the legislature had said: "The bond shall be obligatory upon the principal and sureties as in cases of trustees at common law."

The state treasurer is not responsible as an insurer of the funds and moneys coming into his hands by virtue of his office. His liability is that of a bailee for hire, and he is held to the exercise of good faith and honesty and of that degree of care and skill which a reasonably prudent man would exercise in the conduct of like business of his own. Beyond this his responsibility does not extend. The contrary doctrine resting upon the authority of *United States v. Prescott*, 3 How. [U. S.], 578, has been abandoned. (*United States v. Thomas*, 15 Wall. [U. S.], 337; *Cumberland County v. Pennell*, 69 Me., 357; *State v. McFetridge*, 84 Wis.,

473; *State v. Walsen*, 17 Colo., 170; *Commonwealth v. Godshaw*, 17 S. W. Rep. [Ky.], 737; *Renfroe v. Colquitt*, 74 Ga., 618; *Rock v. Stinger*, 36 Ind., 346; *Bevans v. United States*, 80 U. S., 56; *United States v. Dashiell*, 4 Wall. [U. S.], 182; *Walker v. British Guaranty Association*, 18 Ad. & E., n. s. [Eng.], 276; *Wilson v. People*, 34 Pac. Rep. [Colo.], 944; *Rose v. Hatch*, 5 Ia., 149; *Whitfield v. Le Despencer*, Cowper [Eng.], 765; *York County v. Watson*, 15 S. Car., 1; *Board of Supervisors v. Dorr*, 25 Wend. [N. Y.], 440; *Muzzy v. Shattuck*, 1 Den. [N. Y.], 233; *People v. Faulkner*, 107 N. Y., 477.)

A deposit by a custodian of public or trust funds of the moneys in his possession, in a bank of reputed solvency, is such a prudent and careful disposition of the funds as will relieve him from responsibility though the bank subsequently fails and the funds are lost. There is a plain and well defined distinction between the loaning of such funds and the depositing of them in a bank, unmixed with the depositor's private or personal moneys, and expressly in his official character. (*People v. Faulkner*, 107 N. Y., 477; *State v. McFetridge*, 84 Wis., 473; *Comstock v. Gage*, 91 Ill., 328; *Millard v. Lawrence*, 16 How. [U. S.], 256; *Moulton v. McLean*, 5 Colo. App., 454; *Payne v. Gardiner*, 29 N. Y., 146; *Estate of Law*, 144 Pa. St., 499, 14 L. R. A., 103.)

Griggs, Rinaker & Bibb, Cowin & McHugh, George E. Pritchett, J. W. Deweese, F. M. Hall, W. Q. Bell, and Abbott, Selleck & Lane, also for the sureties.

RYAN, C.

This action was brought in this court upon the bond of J. E. Hill, formerly treasurer of this state,

as it was held in *Re Petition of Attorney General*, 40 Neb., 402, might properly be done. The general verdict of the jury was in favor of the defendants, and upon plaintiff's motion for a new trial, and upon defendants' motion for judgment upon a special verdict also found by the jury, the questions hereinafter considered have been presented in argument. In the consideration of these questions it may be of some use to refer to the case of *State v. Hill*, 38 Neb., 698, in which an attempt was made to acquire jurisdiction of such defendants as were non-residents of Douglas county, by reason of averments in the petition that the defendant Hill had been guilty of breaches of his bond in making deposits of public moneys in certain banks in the city of Omaha. From the petition in this case were omitted this averment, and perhaps such others that it might be unsafe to merely refer to the statements of facts, as therein given, as furnishing a complete summary of those now to be reviewed.

In the case at bar it was alleged that, at the general election held in 1890, John E. Hill was elected treasurer of this state for the two-years term which began on the first Thursday after the first Tuesday in January, 1891. This term, it was alleged, he served as treasurer, the sureties on his bond being his co-defendants in this action, and that, upon the 14th day of January, 1893, he surrendered said office to his successor, Joseph S. Bartley. It was further averred that when John E. Hill entered upon his duties on January 8, 1891, he had in his possession, as incumbent of the same office for the term immediately preceding, the sum of one million five hundred and twenty-four thousand five hundred and fifty-four dollars and sev-

enty-four cents (\$1,524,554.74); that upon entering upon his duties under the bond sued on he received from county treasurers of the state the additional sum of four million two hundred thousand eight hundred and thirty-four dollars and fifty cents (\$4,200,834.50). The total sum with which it was claimed that the defendant Hill should be chargeable upon his bond sued upon was the aggregate of the above two sums, to-wit, the sum of five million seven hundred and twenty-five thousand three hundred and eighty-nine dollars and twenty-four cents (\$5,725,389.24). Although in general terms the liability of the treasurer was charged as to the immense amounts above set out, the breaches alleged were within the range of comparatively familiar figures. These breaches, two in number, were described in such language as indicated the intention of the pleader to avail himself of the technical rule justified, to some extent, by the case of *Cedar County v. Jenal*, 14 Neb., 254. It might happen that an attempt to abbreviate would result in obscuring the theory upon which the petition was drawn, as well as the line of defense adopted by the defendants in their answer, and the emphasis of the theory of the petition found in the reply. At the risk of tediousness an attempt will therefore be made to illustrate the material issues joined and tried with quotations made with great freedom from the pleadings, beginning with the petition, in which were the following averments:

"And the plaintiff, for assigning and setting forth a breach and violation of the conditions of the said bond, alleges that the said John E. Hill, in the county of Lancaster, in the state of Nebraska, during his last term of office did from time

to time unlawfully deposit in and loan to the Capital National Bank of Lincoln, a corporation located and doing business in the county and state last aforesaid, divers large sums and portions of the moneys so as aforesaid held by him and belonging to the state of Nebraska, amounting in all to the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85) and more, the particular sums so deposited and the particular times when they were so deposited the plaintiff is unable more definitely to state. A part of the said moneys so unlawfully loaned and deposited were, from time to time, during his said last term of office, collected and received from said bank, and paid out and accounted for by the said Hill as treasurer as aforesaid for the use and benefit of the state of Nebraska. But, on the 14th of January, 1893, and when he surrendered his said office to his said successor, there remained of the said moneys so unlawfully loaned and deposited the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85) or more, which the said Hill, as such treasurer, had not in any manner used or paid out for the use and benefit of the state of Nebraska or in any manner accounted for, and which he refused and failed to pay over to his said successor, by reason of which the said John E. Hill converted to his own use the said sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85).

“Second Breach.—And the plaintiff, for assigning and setting forth another and second breach and violation of the conditions of said bond, al-

leges that of the moneys so as aforesaid received and held by said John E. Hill as such state treasurer and belonging to the state of Nebraska there still remained at the end of his said last term of office the sum of one million four hundred and forty-four thousand five hundred and fifty-six dollars and forty-two cents (\$1,444,556.42) which he had not, at any time, disbursed upon any warrant or warrants drawn upon the state treasury, according to law, or at any time paid out, disbursed, or disposed of lawfully, or in any authorized manner, or for any lawful, proper, or authorized purpose, or for the use or benefit of the state of Nebraska, and which sum it was his duty to pay over and deliver, at the end of his last term of office, to-wit, on the 14th day of January, A. D. 1893, to his said successor in office; but he failed and refused, except as hereinafter mentioned, to so pay over and deliver to him the said sum or any part thereof, or at any time, or in any manner whatever to account for the same, or any part thereof, to his said successor in office, or otherwise, save that, as the plaintiff is informed and alleges, the said John E. Hill did then pay and turn over to his successor certain small sums of money, the exact amount of which is unknown to the plaintiff, and did assign, transfer, and deliver to his said successor divers and sundry certificates of deposit of certain banks and banking institutions located in the state of Nebraska and other choses in action, the precise nature of which is not fully known to the plaintiff, and which the said John E. Hill in some manner induced his said successor to receive and accept in the place of, and instead of money, among which were, as plaintiff is informed and alleges, certain certifi-

cates of deposit issued by the Capital National Bank of Lincoln, payable to the state treasurer of Nebraska, for certain sums of money therein respectively specified, amounting in the aggregate to the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85), of which amount, as the plaintiff is informed and believes to be true, the said Joseph S. Bartley, successor in the office of the said John E. Hill, subsequently, and on or before the 21st day of January, A. D. 1893, received from the said bank, through or by means of said certificates of deposit, for the use and benefit of the state of Nebraska, divers and sundry sums of money, amounting in the aggregate to the sum of forty-eight thousand nine hundred and ninety-three dollars and twenty-three cents (\$48,993.23), but has never, at any time, received any further or other sums of money upon, through, or by means of the said last mentioned certificates of deposit. And, as the plaintiff alleges upon information and belief, the said Capital National Bank was at the time when said John E. Hill, treasurer, so transferred and delivered the said certificates of deposit to his said successor, and ever since has been, wholly insolvent, and from and after the said 21st day of January, A. D. 1893, has, at all times, failed and refused to pay any sums of money whatsoever upon or toward the amounts payable, according to the tenor of the said certificates of deposit. And his said successor has since that time, as plaintiff is informed and believes, received upon or from, or by means of others of said certificates of deposit or choses in action, and applied for the use and benefit of the state, certain sums of money, the exact amount of which is not

known to the plaintiff. But the said John E. Hill failed and refused, and has ever since failed and refused, to lawfully pay over, disburse, or account for, or pay over to his successor in office, or otherwise or in any manner whatever to apply for the use or benefit of the state of Nebraska, the sum of two hundred and thirty-six thousand three hundred and sixty-four dollars and sixty-two cents (\$236,364.62), and more, of the moneys so received by him as such state treasurer and belonging to the state of Nebraska remaining in his hands at the end of his said last term of office, and in some way converted the same to his own use, and which has not been received by or in any manner applied for the use and benefit of the plaintiff. And by reason of the premises aforesaid the said defendants became and still are indebted to the plaintiff, the state of Nebraska, and the plaintiff has sustained damages in the sum of two hundred and thirty-six thousand three hundred and sixty-four dollars and sixty-two cents (\$236,364.62), for which sum, with interest thereon from the 14th day of January, 1893, the plaintiff demands judgment, and that it may have such further relief in the premises as it may be entitled to."

In the answer filed by John E. Hill it was alleged that his successor's term should have commenced on January 5, 1893; but that, owing to the fact that the legislature had failed seasonably to canvass the vote of such successor, he did not enter upon the duties of his office until January 14, 1893; that the condition of business in the state treasurer's office remained unchanged, and that, when said office, its funds, and property were turned over to John E. Hill's successor on January 14, 1893, they were exactly in the same condi-

tion as they had been on the 5th day of the same month, when said Hill had submitted to the state auditor his accounts and conduct as such treasurer, and when the same had been by said auditor examined and passed upon, approved, and found correct. In this answer it was also alleged that, upon the installation of Joseph S. Bartley as treasurer he examined and passed upon the accounts, papers, certificates of deposit, and other evidences of the funds of the state; that there was so turned over to Joseph S. Bartley, as treasurer, no cash, except, perhaps, five hundred dollars (\$500) in amount; that among the things turned over to Hill's successor there was a certificate of deposit of the Capital National Bank made to the order of the treasurer of the state of Nebraska for the said sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85), which represented the same amount mentioned in the petition, and that this certificate had been received by Treasurer Bartley and accepted on the same day that the Capital National Bank was designated and became a state depository according to law, and in lieu thereof said Bartley received an open account at said bank subject to check and surrendered to said bank its certificate of deposit; that thereafter, on January 16, 1893, the said Joseph S. Bartley, as treasurer, checked out of said bank and received as such over thirty-five thousand dollars (\$35,000) of the said money for which he had been given an open account subject to check; that between the 16th and 20th of January, 1893, said Bartley could have checked out and received from the bank the whole amount of his open account as aforesaid, but refrained from checking out more

than fifty thousand dollars (\$50,000) between said two last named dates. It was alleged in the answer, in effect, that by the Capital National Bank having been designated as a depository bank, and having given bond and duly qualified as such, the opening of an account with it operated to create a credit in favor of the state to the amount of such account, although such credit was based solely upon a deposit of the bank's own evidence of indebtedness, and that from thenceforth John E. Hill was not in any way a party to or in privity with any party to such open account. Upon information and belief it was alleged in this answer that said bank had closed, and at the time such answer was filed was in the hands of a receiver, and that at such closing there was still a portion of said open account which had not been withdrawn from said bank, and that for this balance unpaid Joseph S. Bartley, as treasurer, had filed his claim therefor against said bank and that said demand had been allowed in favor of the plaintiff.

In reply it was admitted that defendant Hill undertook and purported to turn over to his successor all, or what he claimed to be all, the money, excepting an amount not exceeding five hundred dollars (\$500) in the form of certificate deposits of or from various banks in the state of Nebraska, or some similar choses in action, but the plaintiff alleged "that all such transactions excepting the turning over of such sum of actual money were illegal, unauthorized, and in nowise binding upon the state of Nebraska." There were contained in the reply the following averments of the plaintiff: "It admits, upon information and belief, that the defendant's successor, J. S. Bartley, did receive and purport and pretend to accept as money, and

did accept in lieu and instead of money, certain certificates of deposit and other papers purporting to be evidences of the funds of the state, and among them, "three certificates of deposits of the Capital National Bank aforesaid, made to the order of the treasurer of the state of Nebraska, for the aggregate sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85),—but not in one certificate for said sum as alleged in the answer,—one of the said certificates being for the sum of one hundred and fifty thousand dollars (\$150,000), one for the sum of one hundred thousand dollars (\$100,000), and the other for the sum of thirty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$35,357.85), and was induced and prevailed upon by the said defendant to receive and accept the said certificates of deposit in lieu and instead of money to the amount thereof, all of which transactions, the plaintiff alleges and submits to the court, were unauthorized, void, and in nowise binding upon the state of Nebraska." In general terms it may be said that in this reply it was admitted that Joseph S. Bartley indorsed the above described certificates of deposit, and, upon surrender of the same, received credit in open account with said bank for the aggregate amount of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents (\$285,357.85); that between January 16 and January 21, 1893, said Bartley did check out portions of said money aggregating \$48,993.23. Following these admissions was the following language: "But the plaintiff specially denies that thereby the amount represented by the said certificates of deposit, or

any amount, became the money of the state of Nebraska in the said bank, and alleges and submits to the court that the said transactions were illegal, and unauthorized, and in nowise binding upon the state of Nebraska." It was furthermore admitted that the Capital National Bank had been designated as a depository as alleged in the answer, and that it afterwards closed and is in the hands of the comptroller of the currency of the United States and in process of liquidation, and that there purports to remain due from said bank to J. S. Bartley, as treasurer, a balance of the said account, and that, as state treasurer, he has filed a claim against said bank, but specially denied that plaintiff was responsible for or bound by the filing thereof.

From the above description of the averments of the several pleadings relative to the nature of plaintiff's cause of action, and of the defenses thereto presented, it is clear, beyond question, that this suit was brought to recover the exact amount evidenced by the certificates of deposit turned over by Hill to his successor, less such aggregate amounts as had been thereon realized in money; that is, the sum of \$236,364.62, being the difference between \$285,357.85 and \$48,993.23. It is insisted by the defendants that this, in the form of certificates of deposit, was actually turned over to and received by Joseph S. Bartley; also, that he, as treasurer, opened an account with the Capital National Bank as a state depository duly designated and approved as such by the proper officers of the state, and that thereafter defendant Hill was in nowise accountable to the state for this sum. On the other hand, the state insists

that, under the decisions of this court, nothing but cash can operate or be recognized as payment; and that, therefore, as to whatever sums the defendant became liable for as treasurer he could claim an acquittance only by showing payment of actual cash. In line with this theory the defendants upon the trial urged that if only cash could be recognized for one purpose it was equally unavailable for any other purpose, and that, therefore, the defendants could be held liable only for such cash as actually was proven to have come into the hands of State Treasurer Hill. In respect to this branch of the case the evidence was solely that of Mr. Bartlett, Mr. Hill's deputy, who testified as follows:

Q. Can you tell me how much money Mr. Hill had in the treasury on the day, how much in cash he had, when he entered upon his second term, and how much he received from himself as his own successor in actual money?

A. I think it was \$523. * * *

Q. Mr. Bartlett, are you now able to state how much actual money Treasurer Hill deposited in the Capital National Bank during his second term of office?

A. Well, I find during Mr. Hill's second term he deposited in actual cash in the Capital National Bank, \$10,300.

Q. How much actual cash did he draw out of that bank during that same period?

A. He drew for the use of the office from that bank \$17,785.

Q. For the use of the office? Just explain what you mean by that. Tell how it was drawn out.

A. Paid warrants with it.

Q. To whom would the check be drawn?

A. Drawn payable to currency. We would take the check down to the bank and draw currency, bring it up to the office and use that to pay warrants.

Upon the theory of the plaintiff the sum for which Mr. Hill was accountable was the amount evidenced by the three certificates of deposits above referred to. There was no conflict in the evidence in regard to these three certificates being made up of other certificates running back through the entire term for which the bond sued upon was given. Whatever of cash was put into the Capital National Bank, and even more, was by the above quoted evidence shown to have been paid out upon warrants, so that the language used in the petition in a general way, outside of that referring to the above three certificates, found nothing in the proofs to justify a recovery.

The theory upon which this action was begun, and, indeed, was tried, had its origin in *Cedar County v. Jenal*, 14 Neb., 254. That case was originally brought on behalf of Cedar county to recover from Peter Jenal, who had been treasurer of said county, and the sureties on his official bond, a sum of money which it was claimed he had failed and refused to pay over to L. M. Howard, his successor, at the expiration of his term of office. The defendants, by their answer, admitted that at the expiration of Jenal's term the sum of money demanded was in his hands belonging to the county, but they alleged in defense full payment "in the manner required by law." The judgment in favor of the defendants was reversed because of the mistaken view of the law embodied in the following instruction, to-wit: "Mr. Jenal

testifies that he had the amount due from him to the county on deposit in a bank at Yankton; that he requested Mr. Howard, 'his successor,' to go with him to that place and receive the money; that Mr. Howard refused so to do, but instructed Mr. Jenal to bring him a small portion thereof and deposit the rest to his credit in the same bank. Now if you find that these instructions were given and in pursuance thereof Mr. Jenal did bring so much of the money as directed, and left the rest on deposit in the bank to the credit of Mr. Howard, changing the deposit from his name to that of Mr. Howard, and that this was agreed upon by both Howard and Jenal as a payment, and if you further find that the bank at that time had sufficient funds and was able to pay the amount of such deposit, then such transaction would be a payment of such amount of \$3,500 to Mr. Howard, and you would be obliged to find for the defendant." Commenting upon this instruction, LAKE, J., who delivered the opinion of this court, said: "Very clearly to our minds the transaction referred to in this instruction was not a payment of the public money by Jenal to his successor, nor did it relieve the defendants from liability on their bond." There can be no question that the decision of this case was as it should have been, upon the record presented. The bank in which the funds were deposited was in the territory of Dakota. The payment claimed was assumed to be binding upon the county solely because the incoming treasurer had agreed to accept, instead of money, a credit in such bank in favor of himself as treasurer of the county. The first paragraph of the syllabus was sweeping in its enunciation of the general principle involved, and was as fol-

lows: "The payment of money in the hands of a county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money." As applied to the facts involved in the case then under consideration the above principle was just; and yet it is conceivable that here might be facts to which this principle would equally apply, and yet that thereby a grave injustice would be sanctioned. For instance, under the provisions of our present depository law it might admit of grave doubt whether or not the state, having selected a depository and required deposits of public moneys to be made in depositories only, should not be required to recognize such deposits as the equivalent of actual cash in the hands of the outgoing treasurer, and that, when such credit in a bank had been transferred to his successor, the state should be held bound as though actual cash to the same amount had passed between the two treasurers in making a transfer of the office from one to the other. On the other hand, it might admit of serious question whether or not the incoming treasurer or his sureties should be held as for cash with respect to such amounts as had been credited in his favor by the depository bank, no matter how such credit may have been obtained. These questions are mentioned merely to illustrate the danger of stating a very general proposition as a rule of universal application.

Since the unsuccessful party by its pleadings, as well as throughout the entire trial, and upon presentation of its motion for a new trial, has insisted that the depository law which went into effect at the beginning of Treasurer Bartley's

term has no applicability to the facts of this case, it is not necessary to determine the queries above suggested, in determining plaintiff's motion for a new trial. The special verdict of the jury was consistent with its general verdict. It is not deemed necessary to set out this special verdict at length in the already extended description of the issues and evidence involved in this case. The facts therein found were, that on January 14, 1893, the officers by law required to approve depository bonds, to-wit, the governor, secretary of state, and the attorney general, did approve the depository bond of the Capital National Bank in the penal sum of \$700,000, upon which Charles W. Mosher and R. C. Outcalt were sureties; that the three certificates of deposits described in plaintiff's reply were indorsed by J. E. Hill as treasurer to his successor and by him on January 16, 1893, were surrendered to said bank, being indorsed to its president, C. W. Mosher, and in place of these certificates Treasurer Bartley with the amount thereof opened a current account with said bank and before January 21, 1893, had withdrawn therefrom \$48,993.23, but that on the date last named said bank was not open for business and then was, and thenceforward has been, insolvent, and has dishonored certain checks drawn against said account after January 17, 1893, and that on January 22, 1893, said bank and its effects were taken possession of by a bank examiner and afterwards were, by such examiner, turned over to a receiver. It was further found by said special verdict that on May 11, 1893, J. S. Bartley, purporting to act as treasurer of the state of Nebraska, filed a claim with the said receiver for the unpaid balance of the above account, but that

said claim was afterwards returned to him without an allowance thereof being made, and that on September 4, 1895, Treasurer Bartley, by the attorney general of this state, brought suit in the circuit court of the United States for the district of Nebraska, against said receiver, to recover the amount of said balance. The defendants have moved for judgment upon this special verdict. To grant this motion would be to justify the verdict of the jury upon grounds radically different from those chosen by the state, consistently with which grounds the jury were instructed. As we are of the opinion that the motion for a new trial must be overruled, for the reason that there has been suggested or discovered in the record no error prejudicial to plaintiff, it results that, upon the general verdict judgment must be rendered for the defendants. It is therefore deemed advisable to make no order upon the motion for judgment on the special verdict, lest hereafter it might be assumed that the questions thereby presented had been passed upon by this court, in advance of an existing necessity for such action. The motion for a new trial is overruled and it is ordered that judgment be rendered in favor of the defendants upon the general verdict.

NORVAL, J.

This is an original action brought in this court by the state upon the official bond of John E. Hill as state treasurer for his second term of office. There have been two trials. At the first one the jury failed to agree. The second trial resulted in a general verdict for the defendants, and a special verdict was also returned under the directions of the court. A motion for a new trial has

been filed by the state, and a motion by the defendants for judgment upon the special verdict. These motions have been argued and submitted for our consideration.

Before taking up the questions presented by the foregoing motions I deem it proper to express an opinion upon several important propositions which were controverted, and ably argued by counsel during the trial.

Several defenses were interposed by the sureties in their answers, among others, that the bond sued on was never signed by Hill, the principal named therein; that the sureties signed the same upon the express condition that it should not be delivered until it had been signed by said Hill, and that if said instrument was ever delivered to, or filed with, the secretary of state, it was against the defendants' consent and in violation of the condition aforesaid. At both trials one of the objections to the introduction of the bond in evidence urged by the sureties was that the state had failed to show it was ever delivered by Hill to the secretary of state as and for the former's official bond, which objection was overruled. Considerable testimony was adduced for the purpose of establishing the delivery of the instrument, which I do not now deem important to review, or to express an opinion upon its sufficiency, inasmuch as the question of delivery was not an issuable fact in the case. The petition expressly alleges the delivery of the instrument to the proper officer of the state. In the third subdivision of each of the answers of the sureties I find the following language: "This defendant admits that he did sign the instrument in writing mentioned, and by copy attached to the petition,

and in the petition designated as the bond of office of the defendant Hill as treasurer of the plaintiff, but this defendant alleges the fact to be that at the time he signed said instrument it was expressly understood and agreed by and between this defendant and the said defendant Hill, and between defendant and others who had signed and who were to sign said instrument, that said Hill should and would, before said instrument should be delivered or be presented to the governor of the state of Nebraska for approval, and before it should be filed or recorded, be signed by said defendant Hill; and this defendant signed said instrument upon the express condition that it should not be delivered until after it had been signed by said defendant Hill. Defendant further says that said Hill never at any time signed said instrument, and if it was ever delivered it was done in violation of the express condition aforesaid, upon which defendant signed said instrument." It is obvious, that, under the rules governing pleadings in the Code states, the foregoing was insufficient to put in issue the averment in the petition of the delivery of the bond in question. The answer states that "if it [the bond] was ever delivered, it was done in violation of the express conditions" under which it was signed. This averment constituted a substantial admission of the delivery of the bond to the proper officer, and the state was, therefore, not required to prove that fact. (*Dinsmore v. Stimbirt*, 12 Neb., 433; *Miller v. Hurford*, 13 Neb., 22; *School District v. Holmes*, 16 Neb., 488; *Dwelling House Ins. Co. of Boston v. Brewster*, 43 Neb., 528.)

Another objection urged to the admission of the bond in evidence was that it was never signed

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or executed by Treasurer Hill. This contention is based upon the fact that Hill did not subscribe his name to the bond at the usual place for signing below the body of the instrument, and preceding the signatures of the sureties. The question was ably discussed at the bar and in the briefs filed as to whether the sureties upon an official bond are bound where the instrument has not been executed by the principal named therein. There is a sharp conflict in the authorities upon this point. The following decisions lend support to the doctrine that the sureties are liable, even though the principal did not execute the bond: *State v. Bowman*, 10 O., 445; *Trustees of Schools v. Sheik*, 119 Ill., 579; *Locw's Administrator v. Stocker*, 68 Pa. St., 226; *Williams v. Marshall*, 42 Barb. [N. Y.], 524; *Parker v. Bradley*, 2 Hill [N. Y.], 584; *Scott v. Whipple*, 5 Greenl. [Me.], 336; *Kcyser v. Keen*, 17 Pa. St., 327; *Johnson v. Weatherwax*, 9 Kan., 75; *State v. Peck*, 53 Me., 284; *Tillson v. State*, 29 Kan., 452; *State v. Peyton*, 32 Mo. App., 522. There are other cases which hold that such a bond is imperfect and no action can be maintained thereon against the sureties. (*Bean v. Parker*, 17 Mass., 603; *Russell v. Annable*, 109 Mass., 72; *Wood v. Washburn*, 2 Pick. [Mass.], 24; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass., 460; *People v. Hartley*, 21 Cal., 585; *Bunn v. Jetmore*, 70 Mo., 228; *Wells v. Dill*, 6 Martin [La.], 665; *Johnston v. Township of Kimball*, 39 Mich., 187; *Hall v. Parker*, 39 Mich., 287; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich., 279; *Board of Education of Rapid City v. Sweeney*, 48 N. W. Rep. [S. Dak.], 302; *City and County of Sacramento v. Dunlap*, 14 Cal., 421; *Fletcher v. Austin*, 11 Vt., 447; *State v. Austin*, 35 Minn., 51.) Our court, in *Gregory v. Cameron*, 7

Neb., 414, has held that a bond given to secure a stay of execution signed by the sureties alone is invalid, and in *Bollman v. Pasewalk*, 22 Neb., 761, an indemnifying bond signed by the sureties and not executed by the principal therein named, was sustained. Thus it will be seen that not only are the adjudications in other states hopelessly irreconcilable upon the point, but this court is apparently upon record on both sides of the question. As I view the case at bar, it is unnecessary that at this time we should determine which line of decisions lays down the true rule, inasmuch as the proofs adduced on the last trial show beyond controversy that Treasurer Hill did in fact execute the instrument declared upon as and for his official bond. In preparing the bond a printed form was used, the most of the blank spaces therein being filled in the handwriting of Mr. Hill. He wrote his own name three times in the body of the bond, besides inserting the amount of the penalty of the bond and the name of the office to which he had been elected, with the intention of making it his bond, and for the purpose of enabling him to qualify as state treasurer. Following the justification of the several sureties attached to the bond, is the following oath of office:

"STATE OF NEBRASKA, }
LANCASTER COUNTY. } ss.

"I do solemnly swear that I will support the constitution of the United States, and the constitution of the state of Nebraska, and will *faithfully discharge the duties of state treasurer* of the state of Nebraska according to law, to the best of my ability; and that at the election at which I was chosen to fill said office I did not improperly influ-

ence in any way the vote of any elector, nor have I accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office for any official act or influence.

"JOHN E. HILL.

"Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1891.

"AMASA COBB,

"*Chief Justice.*"

It was shown that the signature "John E. Hill" appended to the oath and the words "faithfully discharge the duties of state treasurer," set out in the body thereof, were in Mr. Hill's handwriting; that he obtained the signatures of most of the sureties thereon; that the bond was presented to both Governors Thayer and Boyd, and was approved by each of them; that subsequently it was filed and recorded in the office of the secretary of state—the proper custodian thereof; that the failure of Mr. Hill to subscribe the bond at the usual place was a mere unintentional omission on his part; that he did not know of it until about the time this action was instituted, and that he entered upon and discharged the duties of his office for the full term in the belief that he had qualified as required by law. These facts, under the authorities, constitute a signing and execution of the bond by Hill, and the sureties are as firmly bound as though their principal had signed his name at the usual place at the bottom of the instrument. (*Gage County v. Fulton*, 16 Neb., 5; *Taylor v. Dobbins*, 1 Strange [Eng.], 399; *Schneider v. Norris*, 2 M. & S. [Eng.], 286; *Morison v. Turnour*, 18 Ves. Ch. [Eng.], 175; *Bleakley v. Smith*, 34 Eng. Ch., 150;

Clason v. Bailey, 14 Johns. [N. Y.], 484; *Penniman v. Hartshorn*, 13 Mass., 87; *Schmidt v. Schmaelter*, 45 Mo., 502; *Fulshear v. Randon*, 18 Tex., 275; *Wise v. Ray*, 3 Greene [Ia.], 430; *McConnell v. Brillhart*, 17 Ill., 359; *Barry v. Coombe*, 1 Pet. [U. S.], 640; *Palmer v. Grant*, 4 Conn., 389; *Quin v. Sterne*, 26 Ga., 223; *Drury v. Young*, 58 Md., 546; *Hall v. Lafayette County*, 69 Miss., 529; *McLeod v. State*, 69 Miss., 221.) The last two cases are directly in point. The last one was an action on the official bond of McLeod as sheriff and tax collector. The instrument was prepared by McLeod, he inserting his name in two places in the body thereof, and in that condition it was presented to, and signed by, the sureties, they leaving the first line at the end of the bond for McLeod's signature. Through inadvertence he failed to attach his signature there, and the bond was approved. McLeod took and subscribed the oath required, and thereafter entered upon the duties of his office. In an action upon the bond, the sureties attempted to show that they signed the instrument on the condition that the principal was also to sign it, but the trial court refused to allow such evidence to be given, and gave a peremptory instruction to find for the plaintiff, and a verdict was returned in accordance therewith. The judgment entered against McLeod and his sureties was affirmed by the supreme court. Cooper, J., in delivering the opinion of the court observes: "McLeod made the bond, and his name twice appeared in the body thereof, written by him. True, he says that he did not intend his name, as written, to be his final signature or subscription thereto; but he testifies that the bond, as it now appears, was delivered by him as his official bond, and accepted as such by the approv-

ing authorities. He intended the bond, as written by him, to be operative; and when this appears, and the name appears in the instrument, written by the party, such signature, adopted by the final delivery, intended as such, is such an authenticating signature as discloses the purpose of the obligor." The usual place for signatures to a bond is at the bottom of the instrument, but its validity does not necessarily depend on its being signed there, as the authorities last above cited show. The statute (sec. 8, ch. 10, Compiled Statutes) relating to bonds of state officers does not require such a bond to be subscribed by the principal therein, but provides that it shall be executed by him, with at least three sureties. It is therefore of no consequence on what part of the bond Hill wrote his name,—whether at the top, in the body, or at the bottom,—so he placed his name thereon with the intention of binding himself. This we think he did, and therefore he duly signed and executed the bond, as fully and completely as if he had attached his signature at the bottom of the instrument. The liability of the defendant sureties is conditional to that of their principal. He being bound, they are also bound. We so held and instructed the jury upon the last trial.

Another defense interposed by the sureties was, as already indicated, that they executed the bond upon the condition that the principal should likewise sign it, and that they did not consent to its delivery without it. Numerous authorities were called to our attention which lay down the rule that an official bond, signed by sureties alone, whose signatures were secured upon the promise of the officer that he would also execute the same before delivery, and without their knowledge and

consent it was accepted and approved without the signature of the principal, is invalid and of no binding force whatever. Had it been established that Treasurer Hill never signed the bond under consideration, the decisions relied upon by the sureties would be in point. It is not alleged in the answers that Hill promised to subscribe the bond by writing his name at the usual place for signatures, but that he agreed to sign the instrument. Inasmuch as Hill did execute the bond, although he failed to sign it at the bottom, the defense interposed that the bond was delivered in violation of the condition pleaded has fallen to the ground.

The motion for a new trial contains several assignments, but they need not be stated, nor shall I discuss each assignment separately. I shall direct my attention alone to such questions as were argued upon the presentation of said motion and the motion of defendants for judgment upon the special verdict.

The petition alleges two breaches of the bond, the first being that the defendant Hill, during his second or last term of office, deposited of the moneys held by him and belonging to the state the sum of \$285,357.85 in the Capital National Bank of Lincoln; that said sum had not been disbursed or paid out for the use and benefit of the state or in any manner accounted for, but so remained on deposit in said bank when he surrendered his office to his successor, and that he has failed and refused to pay over the amount thereof to such successor. For a second breach it is averred, in effect, that at the end of Hill's last term of office, in making settlement with Joseph S. Bartley, his successor in office, for the money

received and held by him as such state treasurer and which then remained in his hands undischarged, said Hill turned over to said Bartley, who received and accepted in lieu of money certain certificates of deposit issued by said Capital National Bank amounting in the aggregate to the sum of \$285,357.85, of which amount said Bartley has subsequently received upon said certificates from said bank certain sums of money, aggregating the sum of \$48,993.23 and no more, and that said bank was, at the time said certificates were turned over by Hill, and ever since has been, wholly insolvent, and it has failed and refused to pay any other sums of money upon said certificates of deposit, and that by reason of the premises aforesaid the conditions of said bond are broken and the defendants became indebted to the state in the difference between the amounts of said certificates of deposit and the sums received thereon by said Bartley, to-wit, \$236,364.62, for which amount, with interest thereon, judgment is prayed. Although two breaches of the bond are alleged, the action is to recover but a single sum, namely, the amount last above stated.

It is conceded by the state that the defendant Hill has fully accounted for all moneys which came into his hands as state treasurer, save and except the sum last aforesaid. It was also established beyond controversy that only a small portion of the revenues of the state was paid to Hill in actual cash, but that almost the entire bulk thereof was received by him in bank drafts, checks, and certificates of deposit as for and instead of money; that Hill, in settling with his successor, delivered to the latter certificates of deposit and other choses in action of the same

character as those which Hill had accepted as treasurer; and that Hill has properly paid out and disbursed, or accounted to his successor in office for all sums received by him in his official capacity in actual cash, as well as for all drafts, checks, certificates of deposit, or other evidences of indebtedness received by him for the use of the state, which the proofs disclose he converted into money during his second term.

The following facts were established upon the trial by uncontradicted testimony, and the jury by their special verdict substantially so found: That J. S. Bartley, after his induction into office as state treasurer, received from the defendant Hill, as money, three certificates of deposit aggregating \$285,357.85, issued by the Capital National Bank, each payable to the order of "State Treasurer of Nebraska," each of said certificates being indorsed "J. E. Hill, State Treasurer;" that subsequently on January 14, 1893, the Capital National Bank was duly made a state depository; that two days later said Bartley as state treasurer indorsed said certificates of deposit and delivered the same to said bank, and took credit for the aggregate amount of said certificates on open account with said bank in the name of "J. S. Bartley, Treasurer," which certificates were thereafter retained by said bank; that there were drawn by said Bartley, and paid by said bank, checks to the aggregate amount of \$48,993.23, there being no deposit other than already stated; that on January 14, 1893, and thenceforth said bank was insolvent; that on the 21st of said month it ceased to do business, and a receiver was appointed; that nothing further, either by the state or said Bartley, has been realized from said deposit or account;

that on September 4, 1895, said Bartley, as state treasurer, by the attorney general as his attorney, brought suit in the circuit court of the United States for the district of Nebraska against the receiver of said bank for the recovery of said unpaid balance. The state insists that the acceptance by Bartley from Hill, his predecessor in office, of the said certificates of deposit issued by the Capital National Bank, aggregating the sum of \$285,357.85, did not constitute a payment so as to release the outgoing treasurer; in other words, that an outgoing officer can make payment to his successor in nothing but money. This view was adopted by the court upon the trial of the case, and the jury were so instructed in the following language:

"4. You are instructed that the payment of money in the hands of a state or county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. The mere delivery of certificates of deposit issued by a bank, upon which no money is realized, is not a payment."

The soundness of this rule is doubted by some of my associates, but it is the doctrine expressly held and applied in *Cedar County v. Jenal*, 14 Neb., 254. That was an action upon the official bond of Peter Jenal, late county treasurer, to recover moneys which it was claimed he had failed to pay at the expiration of his term to one Howard, his successor. The amount sued for was by the answer of the defendants admitted to have been in Jenal's hands at the close of his term, the defense being that he had paid the same to said Howard by depositing the amount, under the express direc-

tions of said Howard, in the latter's name with one Parmer, a banker, receiving therefor certificates of deposit, which Jenal delivered to and which were accepted by said Howard as payment of the amount found chargeable against the outgoing treasurer on settlement. There was judgment in the district court for Jenal and his sureties, which was reversed by this court on the ground alone that the facts above stated did not constitute a payment. In the opinion, which was written by LAKE, C. J., it is said: "Is the matter pleaded as payment a defense? We think not. The bond given by the defendant, on which the action was brought, required Jenal to 'promptly pay over to the person or officer entitled thereto, all money' which might 'come into his hands by virtue of his said office,' and to 'faithfully account for all balances of money remaining in his hands at the termination of his office.' Section 94 of the revenue act, General Statutes, 930, provides that the 'treasurer, on going out of office, shall deliver to his successor in office all public moneys,' etc., 'in his possession.' And the next section declares that if he 'shall fail * * * to pay over all moneys with which he may stand charged at the time, and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions, * * * to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county.' Thus we see that, it being money that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county

to pay money. The payment of money can be effectuated only by the delivery of that which by the law of the land is recognized as money. Even if Howard, the successor in office, did agree to accept these certificates in payment, which, however, he denies, no money having been realized from them, it could avail the defendants nothing as against the county. In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. (Criminal Code, sec. 124.) It would indeed be a strange system of laws that would permit an act, denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice." The foregoing is clear cut. The language has no doubtful meaning, nor was this utterance of the court mere *obiter*. The question was squarely involved whether an outgoing treasurer can make payment to his successor in anything except money, and the court said, and rightly so, in my judgment, that he could not. To be sure, in that case it appears that Howard, who was Jenal's successor, denied that he agreed to accept the certificates as payment, but the verdict being for Jenal, we must

assume that the evidence was sufficient to establish, and the jury must have found, that Howard received the certificates in lieu of cash. This decision has never been overruled, but was cited with approval in *Wayne County v. Bressler*, 32 Neb., 818; and was also cited in *State v. Hill*, 38 Neb., 698. In the opinion in the last case, IRVINE, C., uses this language: "From the statutes already quoted and from the decisions of this court (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818) it is clear that it is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where by recent statutes they are permitted to invest or deposit it, and then such investment or deposit must be made only in the manner provided by law. Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest it in any manner, or to deposit it. * * * When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a conversion and a cause of action accrued." If Hill could not lawfully, and without violating the conditions of his bond, deposit in bank the moneys belonging to the state, I do not understand by what process of reasoning it can be held where he has made such deposit of public funds and received a certificate of deposit as evidence thereof, and turned the same over to his successor in making settlement with him at the expiration of his term, that it would release the outgoing treasurer and his sureties to the extent of the amount of such certificate.

The decision of the *Jenal Case* was placed upon

two grounds: First—That the bond and the statutes of the state alike required the treasurer to make payment to his successor in money. Second—That under the Criminal Code it is a crime for a treasurer to loan the public funds or to deposit the same in bank. It may be that the last ground is untenable, yet, nevertheless, the other course of reasoning adopted by the author of the opinion is not only sound, but unanswerable. The doctrine of the *Jenal Case* is neither new nor startling. It merely recognized and applied a familiar principle of the law of agency to a public officer. An agent cannot bind his principal by receiving anything but money in discharge of a debt due the principal, unless authorized by the latter so to do. An attorney cannot discharge a judgment in favor of his client except by the payment of the full amount thereof in money, unless empowered to do otherwise, or there has been a subsequent ratification. Should he accept, in payment of a judgment, a promissory note, the plaintiff would not be bound. In *Smith v. Jones*, 47 Neb., 110, this court said: "The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only;" citing *Hamrick v. Combs*, 14 Neb., 381; *Stoll v. Sheldon*, 13 Neb., 207; *State Bank of Nebraska v. Green*, 8 Neb., 297; *Luce v. Foster*, 42 Neb., 818.

As Bartley was merely the agent of the state, he could not bind the public by accepting from his predecessor, Hill, anything which by the law of the land is not regarded as money. Undoubtedly, as between individuals, payment of a debt may be made in any mode which the parties agree shall be treated as the equivalent of a money payment.

In such a case it may be by anything of value which is delivered and accepted for the purpose of extinguishing the indebtedness. It may be made in property or in services, or by a certificate of deposit, if the parties so agree. This is, in effect, the holding in *Hughes v. Kellogg*, 3 Neb., 186; but that decision does not justify the conclusion that a public officer can make payment to his successor by delivery of certificates of deposit or anything else than money, so as to bind the public. If these certificates of deposit had been delivered by Hill to Bartley in satisfaction of an individual indebtedness of the former to the latter, then I agree this would have constituted a valid payment, and the case of *Hughes v. Kellogg*, *supra*, would be analogous. I suppose it will not be questioned by any one that had Bartley accepted as payment from Hill promissory notes of responsible third persons, or other choses in action, that such payment would have been ineffectual to release these defendants. If such be the law, and there can be no doubt of it, then logically it follows that the acceptance by Bartley of the certificates of deposit upon an insolvent bank did not bind the state,—at least no further than the same may have been by him converted into money,—since certificates of deposit, in form like those under consideration, are in substance and legal effect promissory notes. They are but the mere promises of the Capital National Bank to pay money. (*Bailey v. Bailey*, 25 Mich., 190; *Tripp v. Curtenius*, 36 Mich., 495; *Citizens Nat. Bank v. Brown*, 45 O. St., 39; *Howe v. Hartness*, 11 O. St., 449; *Welton v. Adams*, 4 Cal., 37; *Brummagin v. Tallant*, 29 Cal., 503; *Payne v. Gardiner*, 29 N. Y., 146; *Renfro Bros. v. Merchants & Mechanics Bank*,

83 Ala., 425; *Klauber v. Biggerstaff*, 47 Wis., 551; *Curran v. Witter*, 68 Wis., 16.)

In *Bank of Orange County v. Wakeman*, 1 Cow. [N. Y.], 46, it was held that an officer cannot lawfully receive a promissory note as payment.

In *Elliott v. Miller*, 8 Mich., 132, it was decided that a township treasurer has no right to receive in payment of taxes a draft or anything which the law has not authorized to be so received. To the same effect is *Jones v. Wright*, 34 Mich., 371.

It was ruled in *People v. McKinney*, 10 Mich., 54, that the reception by the state treasurer of drafts drawn by a railroad company on a New York bank in payment of taxes, did not amount to a payment any further than the money had been received by the treasurer upon such drafts.

Campbell, J., in his separate opinion in *City of Lansing v. Wood*, 57 Mich., 201, which was an action on the bond of Wood, the treasurer of the city of Lansing, for failure to pay over moneys received by him during his official term, in discussing whether the receipting for certificates of deposit as cash by the incoming treasurer from the outgoing one operated to bind the city, says: "Such a certificate is no payment unless received as such by one who has power to accept payment in that way. The question is not, perhaps, of any great importance, except in the one point of view urged on the argument that Wood had lawfully deposited his official moneys in Angell's bank, and by this process merely shifted the deposit to his successor, who thereby made the same bank his own place of deposit. No authority is found in our reports, and, so far as we have discovered, none exists anywhere, which favors the idea that a public treasurer may accept from a public

debtor payment in anything but money. If he takes anything else, he may make himself liable for any harm that may come from his doing so, but until the money is actually realized, the debtor has made no payment which will bind the creditor. If the money is realized the payment then becomes complete, but not otherwise."

We have carefully examined the opinion in *State v. McFetridge*, 84 Wis., 473. The sole question there before the court was whether a state treasurer and his sureties on his official bond were liable to the state for interest received by such officer for state funds deposited by him in bank. Such liability was held to exist. Whether an outgoing treasurer could bind the state by the delivery to his successor of certificates of deposit as and for money held by him by virtue of his office was neither involved nor decided in that case. In our investigation of the subject we have been unable to find a single authority, and none has been cited, which holds that the mere delivery and acceptance of certificates of deposit, upon which no money has been obtained, is such a payment as will discharge the outgoing officer.

The statute (sec. 2, art. 4, ch. 83, Compiled Statutes) provides that "it shall be the duty of the state treasurer: First—To receive and keep all moneys of the state not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the state treasury according to law and not otherwise. Third—To keep a just, true, and comprehensive account of all moneys received and disbursed. * * * Eighth—He shall account for and pay over all moneys received by him as such treasurer to his successor in

office." The foregoing statute defining the duties of the state treasurer requires him to account for and pay over, on the expiration of his term, to his successor all moneys received by him belonging to the state. This he can alone do by delivering the amount in actual cash. In no other way can he satisfy the conditions of his bond to well and truly perform the duties of his office required by law. It is money that he is required to pay over. It is idle to say that a certificate of deposit is money. We know it is not. It is the mere promise of the person or bank issuing it to pay money either on demand or at a fixed time. It is absurd to say that a promise to pay money is money. No person is required to accept such paper in discharge of a debt, and yet it is insisted that the liability of an outgoing officer and his sureties is released by the delivery to and acceptance by his successor of certificates of deposit in settlement, and that the state, whether it will or not, is bound. To such doctrine I cannot yield assent. Both upon principle and authority, I am fully satisfied that prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in banks, which law was not in force when Hill settled with Bartley, a turning over by a state treasurer to his successor as moneys received by him during his official term certificates of deposit issued by a bank, would not alone exonerate such outgoing officer and his sureties from liability.

It is argued that the rule in the *Jenal Case* cuts both ways; that is, if Hill is not entitled to credit for the certificates of deposit turned over at the end of his term to his successor, then he is only chargeable with the amount received in cash at

the commencement of, and the sums paid in money during such term, and is not liable as for money for the amounts of any drafts, checks, or certificates of deposits accepted by Hill as so much money due the state. This view was presented to the jury by the sixth instruction. But upon reflection and considerable examination of the subject, I am now convinced that while Hill had no right to receive anything but money in payment of a demand due to the state, yet having done so, it does not necessarily follow that he is not liable to the state. Although Hill could not bind the state by accepting certificates of deposit or other choses in action in satisfaction of demands due the state, yet such payment could be subsequently ratified. In case of such ratification the state is bound, and Hill and his sureties are likewise bound. The state, by instituting this suit and charging Hill with the amounts received from all sources, whether payments were made in cash, or by certificates of deposit, or other evidences of indebtedness, ratified Hill's action, and by treating the acceptance by Hill of such certificates of deposit or other evidences of indebtedness as a payment, the state thereby lost its remedy against the party whose indebtedness was extinguished by the delivery to Hill of such certificates of deposit or other choses in action as payment, and Hill and his bondsmen are liable the same as if the actual cash had been received. (*Modisett v. Governor*, 2 Blackf. [Ind.], 135; *Armstrong v. Garrow*, 6 Cow. [N. Y.], 465; *Heald v. Bennett*, 1 Doug. [Mich.], 513; *Welch v. Frost*, 1 Mich., 30; *Jones v. Wright*, 34 Mich., 371.) The last case was a proceeding by *mandamus* to compel the respondent to pay certain school moneys which, as

township treasurer, he had collected and failed to pay over. One of the defenses was that the respondent had accepted various local orders instead of money in payment of the taxes levied for school purposes. The court held this defense unavailing. The second subdivision of the syllabus reads thus: "A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and if he chooses to do so and to receipt for the taxes, he must make good the amount." Although the state had the power to repudiate any payment made to Hill in anything other than money, it was not bound so to do, and there is no claim that it has repudiated any payment so made. It is equally clear that Hill and his sureties are estopped to repudiate any such payment.

The record discloses that of the moneys of the state in Treasurer Hill's hands at the beginning of his last term, the sum of \$177,489.84 was to his credit upon open account in the Capital National Bank, and the further sum of \$90,000 was represented by outstanding certificates of deposit issued by said bank and held by said Hill as state treasurer; that he deposited divers sums of money in said bank during his last term and took credit therefor on his open account, and checks for various sums were likewise drawn from time to time by Hill against said account, which were paid by the bank; that a portion of these credits was carried through Hill's second term and was merged into the certificates of deposit which were turned over by him to Bartley. The case was submitted to the jury upon the theory that defendants were only liable for the amount of money Hill received upon said certificates and open account during his

second term. Upon this branch of the case the jury were directed by the seventh instruction as follows: "Should you find that there was any agreement between Hill and the bank with respect to the application of withdrawals by him, such agreement is binding upon the parties to the action. If, however, no such understanding existed, it is the right of the defendant Hill to direct the application to be made of such withdrawals, and it is not within the power of the state to make another or different application thereof." The rule deducible from the authorities in regard to the application of payments may be summarized as follows: A debtor paying money has the right to direct its application, but if he fails to do so, the creditor may make the application at any time before suit is brought. (*Robinson v. Doolittle*, 12 Vt., 246; *Wendt v. Ross*, 33 Cal., 650; *McCune v. Belt*, 45 Mo., 174; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720.) It is equally well settled that where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items. (*Lazarus v. Friedheim*, 11 S. W. Rep. [Ark.], 518; *Pierce v. Knight*, 31 Vt., 701; *Milliken v. Tufts*, 31 Me., 497; *Wendt v. Ross*, 33 Cal., 650; *Thurlow v. Gilmore*, 40 Me., 378; *Harrison v. Johnston*, 27 Ala., 445; *Hershey v. Bennett*, 9 N. W. Rep. [Minn.], 590; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720; *Jones v. United States*, 7 How. [U. S.], 684.) In the last case the rule was applied to a running account between the United States and a postmaster. In *United States v. Kirkpatrick*, *supra*, Judge Story in delivering the opinion of the court said: "The

general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due." The rule respecting the appropriation of payments which was given in the case at bar I am constrained to hold was erroneous; but the verdict should not be set aside for error in this or any other instruction given to the jury, inasmuch as the verdict is the only one which should have been returned under the evidence, as I shall hereafter show. (*Converse v. Meyer*, 14 Neb., 190; *Knowlton v. Mandeville*, 20 Neb., 59; *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732.)

It remains to be determined whether the facts found by the special verdict, standing alone, or when taken in connection with the other facts, established by uncontradicted proofs, constitute a defense to the action. It is strenuously insisted that the surrender by Bartley of the certificates of deposit which he received from Hill to the Capital National Bank—the institution which had issued them—after it had become a state depository, and taking credit therefor on open ac-

count as state treasurer, amounted to a novation and operated as a release of the defendants from liability on their bond. I shall not at this time stop to discuss this line of defense. I am convinced that upon another ground the action must fail. While Bartley had no power to bind the state by accepting these certificates of deposit as payment, yet his action in that regard was subsequently ratified by the state. It is disclosed by this record that after the deposit of said certificates of deposit in the Capital National Bank to the credit of Bartley, as state treasurer, he drew checks against said account aggregating \$48,993.23, which were paid by said bank before its doors were closed. The state in its petition herein gave Hill credit for the same. Furthermore, the legislature, at its last session, in the act making appropriation for the current expenses of the state government for the ensuing years, and to pay the miscellaneous items of indebtedness of the state, made the following appropriation: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one hundredths (\$180,101.75) dollars, to reimburse said fund for the same amount *tied up in Capital National Bank.*" (Session Laws, 1895, p. 404, ch. 88.) Subsequently, Bartley, as state treasurer, by the attorney general as his attorney, brought suit against the receiver of said bank to recover the unpaid balance of said account. I am convinced upon full consideration of these matters that the state has ratified the act of Bartley in accepting said certificates of deposit from Hill as money, and thereby exonerated him from liability upon his bond. The only funds in the Capital National Bank which the state had, or could claim to have,

any interest in, it was shown were those arising from the deposit of the certificates received from Hill. The legislature must have regarded this claim against the bank as belonging to the state, else it would not, in making the appropriation aforesaid to reimburse the sinking fund, which had become impaired by the failure of the bank, have used the words, "amount tied up in the Capital National Bank." Had the law-makers desired to repudiate the act of Hill in delivering to his successor said certificates as money, in making said appropriation, it is reasonable to suppose they would have stated in the act the impairment of the sinking fund was occasioned by the money belonging thereto being "tied up in Hill's hands," or used some other appropriate designation. There is no room to doubt that the legislature was clothed with ample power to ratify the act of Bartley in receiving the certificates of deposit in settlement with Hill. (See *City of Lansing v. Wood*, 57 Mich., 201; *Board of Education v. McLandsborough*, 36 O. St., 227; *Mount v. State*, 90 Ind., 29; *Jewell Nursery Co. v. State*, 56 N. W. Rep. [S. Dak.], 113.) In the last case it was decided that there was a ratification, notwithstanding the governor vetoed the act passed by the legislature relied upon to show such ratification; and in the Michigan case it was held competent to show, in an action upon the bond of a city treasurer, that the city council had ratified and approved the act of the treasurer in turning over to his successor, in lieu of money, certain certificates of deposit issued by a bank that afterward failed. For the reason given, the motion for a new trial should be overruled and judgment rendered for the defendants.

Post, C. J.

I quite agree with my Brother RYAN that the motion for a new trial should be denied, but without dissenting from the views expressed by him, I prefer to rest my conclusions upon other and, as appears to me, more substantial grounds. I was at the inception of this controversy, in common with my associates, firmly committed to the doctrine that Hill could discharge the obligations of his bond, as state treasurer, only by the actual payment to his successor, in cash, of the full amount with which he was in law chargeable at the close of his second term. However, the investigation incident to two trials of the cause has led to the conviction that that doctrine is wholly indefensible.

There are certain facts clearly established by the proofs, and as to which there is no controversy, viz., that Hill, at the close of his second term, tendered to his successor, Bartley, as representing the funds with which he was chargeable, certain certificates of deposit, including three certificates issued by the Capital National Bank of Lincoln amounting in the aggregate to \$285,357.85; that Bartley, not being satisfied regarding value of the certificates so tendered, a committee of bankers was mutually chosen to pass upon the solvency of the several banks by which they were payable; that upon the recommendation of said committee certain certificates were rejected and the others, including those of the Capital National Bank above mentioned, were by Bartley accepted as payment of the full amount of their face value. The result of that transaction was, I conceive, to render Bartley liable abso-

lutely upon his bond for the amount of money represented by the certificates of deposit so accepted by him, as effectually for all purposes as if he instead thereof had demanded and received from his predecessor legal tender currency or gold coin of the United States. It follows, as the result of that conclusion, that the receipt by Bartley of said certificates operated as a discharge *pro tanto* of the liability of Hill, which is in nowise affected by the subsequent failure of the Capital National Bank after being charged with the amount of such certificates as a state depository in accordance with the act of 1891. We can imagine cases in which the state, or other public body, may, by the proper action, pursue two successive treasurers individually in order to enforce a common liability, although it does not follow that it may have concurrent remedies upon the bonds of successive officers for the same cause of action. Indeed, the converse of that proposition appears to be too clear for argument, for whatever is by law recognized as a sufficient payment of public funds, by an officer to his successor, so as to charge the latter upon his official bond, will *per se* operate to discharge the former. I must not, however, be understood as holding that the power of an officer to bind his sureties or the public, in receipting for public moneys, is without limitation.

It is conceded, by way of illustration, that by no mere barter between Hill and Bartley could the latter have charged his sureties as for money received, or the former have relieved himself from liability upon his bond. Such a transaction is confessedly *ultra vires* and ineffectual for the purpose of concluding either the state or the sureties of an incoming treasurer; but in the absence of

statutory restrictions upon the subject, the system employed in the monetary transactions of the world, by which payments are made, and charges and credits adjusted through the agency of checks, drafts, and certificates of deposit, is so far applicable to custodians of public money as to render them liable for remittances thus in good faith made and received, provided such instruments be, as in this instance, accepted in payment, and not for collection and credit at the debtor's risk; and it can, on principle, make no difference in the application of that rule whether such payment be made by the owner of property for taxes assessed against him, or by a treasurer to his successor of the balance on hand at the close of his term of office. Lest my position may possibly be misunderstood, I repeat that Bartley, having accepted as money the certificates of deposit, is chargeable therewith as money. And the payment thus made being in accordance with the means generally, if not, indeed, necessarily, employed for the transfer of large balances, is within the scope of the authority of Hill and Bartley in their capacities as retiring and incoming treasurers, and therefore conclusive upon the state to the extent that its remedy is upon the bond of the latter for the funds so transferred. These views are not, I am aware, in accordance with certain expressions of opinion by this court, and for that reason an examination of the cases bearing upon the subject is appropriate in this connection.

State v. Keim, 8 Neb., 63, was an action below to recover the sum of \$2,000 deposited by the state treasurer for safe-keeping with the defendants, who were doing business as private bankers. It was held on demurrer to the petition, and also on

review by this court, that the depositing in bank of state funds is in contemplation of law a loan thereof within the meaning of section 124 of the Criminal Code, that such a transaction is wholly unauthorized by statute and contrary to the spirit and policy of our laws, and cannot be made the basis of an action by the state in the absence of an express ratification by the legislature. The statutory provision above referred to, so far as material to the present inquiry, is as follows: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state or to any county, or precinct, organized city or village, or school district in this state, shall convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, and shall thus be converted, used, invested, loaned, or paid out as aforesaid; which is hereby declared to be a high crime, and such officer or person or persons shall

be imprisoned in the penitentiary, not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and, also, pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, for the use only of the party or parties whose money or other funds, property, bonds or securities, assets, or effects of any kind as aforesaid, has been so embezzled." (Criminal Code, sec. 124.)

First Nat. Bank of South Bend, Ind., v. Gandy, 11 Neb., 431, is an exaggerated statement of the same proposition, since it is there held, following *State v. Keim*, that funds of the county deposited in bank for safe-keeping by the defendant to his account, as treasurer, could by means of garnishee process be appropriated in satisfaction of a judgment against him individually. The following extract from the opinion in that case serves to illustrate the process of reasoning which led to the conclusion stated: "It does not lie in the mouth of Mr. Gandy or any of his privies, of which the Farmers & Merchants Bank is one, in respect to these funds, to deny that they are the private money of Mr. Gandy, which alone he had a right to deposit in bank, and the bank had a right to receive from him on deposit."

Cedar County v. Jenal, 14 Neb., 254, was an action on the bond of a county treasurer, the defense relied upon being the transfer by the defendant to the account of Howard, his successor, of certain funds of the county, then on deposit in bank, and the delivery to the latter of certificates of deposit

therefor. It is noticeable that *State v. Keim* and *First Nat. Bank of South Bend, Ind., v. Gandy*, although not mentioned by the court, are cited as authority by counsel for the county, and appear to have had a controlling influence in the decision, judging from the following language of LAKE, C. J.: "In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. (Criminal Code, sec. 124.) It would indeed be a strange system of laws that would permit an act denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice."

Wayne County v. Bressler, 32 Neb., 818, was an action against a treasurer individually, and not upon his bond, for the recovery of profits realized from the use by him in his private business of the funds of the county. It was held on the authority of the prior cases above cited that the action would not lie.

In *State v. Hill*, 38 Neb., 698, which was an action upon the bond involved in this cause, it was said: "It is the duty of both state and county treasurers to keep the money coming into their

official custody in specie, except where by recent statutes they are permitted to invest or deposit it. * * * Hill's duty was to keep the money in the treasury at Lincoln. * * * When he, Hill, removed the money from the treasurer's office with the intention of depositing it contrary to law, he was guilty of a conversion and a cause of action accrued."

It does not require a critical examination to perceive that subsequent cases, so far as they sustain the contention of the plaintiff in the present controversy, all depend for their authority upon *State v. Keim*; but that case, although in this state accepted as an authoritative statement of the law, appears, from a more careful analysis, to rest upon premises wholly false, while the doctrine therein asserted has been, by a verdict practically unanimous, rejected in other jurisdictions. Reduced to the form of a syllogism, the reasoning there employed may be thus stated: Public money unlawfully loaned by an officer charged with its collection or safe-keeping cannot, in the absence of an express ratification, be followed and recovered by the state, county, or other public body. The deposit in bank for safe-keeping, by an officer, of public money in his official custody, is a loan thereof within the meaning of the Criminal Code. Therefore public money cannot be recovered in an action against the bank in which it is deposited for safe-keeping without an express ratification of such unlawful loan. The subject might in view of the obvious fallacy of that argument be dismissed without further comment, but in view of the importance of the controversy and the gravity of the question involved, a reference to a few of the many authorities in conflict with the utter-

ances of this court will be here indulged. Mr. Mechem, in a note to section 922 of his valuable work on Public Officers, after a careful review of the authorities, intimates that *State v. Keim* stands alone in denying to the state the right to recover upon the facts reported, and adds that it "is not consistent with reason or authority if it was intended to hold that the state could not recover the money at all." And in *Wolffe v. State*, 79 Ala., 201, Chief Justice Stone, in criticising that case, declares that it ignores "the principle that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself a trustee and must account as a trustee."

San Diego County v. California Nat. Bank, 52 Fed. Rep., 59, arose out of a state of facts quite similar to *First Nat. Bank of South Bend, Ind., v. Gandy*, *supra*. There one D. made a deposit of money to his account as county treasurer, there being no agreement that the identical money should be returned, and it was in fact mingled with the funds of the bank. It was held, in an elaborate opinion by Judge Ross, that the county could recover on the ground that the bank was a mere trustee and was liable as such; and the principle there stated was distinctly recognized by this court in the recent case of *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, holding that trust funds do not lose their character as such by being deposited in bank to the trustee's own account, but may be followed through any number of transformations and reclaimed by the owner so long as they can be distinguished in the hands of the trustee or his assignees.

So much for the major premise of that argument. Let us now determine whether there ex-

ists for the minor premise a more substantial foundation; or, in other words, was the deposit by Hill of the state's funds for safe-keeping in the Capital National Bank a loan thereof within the denunciation of the Criminal Code? By section 18, chapter 4, Revised Statutes, 1866, the duties of the territorial treasurer were defined as follows: "First—To receive and keep all moneys of the territory not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the territorial treasury according to law, and not otherwise. Third—To keep a just, true, and comprehensive account of all moneys received and disbursed. * * * Sixth—To render a full statement to the auditor of all moneys received by him, from whatever source; if on account of revenue, for what years; of all penalties and interest on delinquent taxes reported to or accounted for to him, and of all disbursements of public funds; with a list in numerical order of all warrants redeemed, the name of the payee, amount, interest, and total amount allowed thereon; with the amount of the balance of the several funds unexpended; which statement shall be made on the first day of December, March, June, and September, and oftener if required. * * * Ninth—He shall account for, and pay over, all moneys received by him as such treasurer, to his successor in office, and deliver all books, vouchers, and effects of office to him, and such successor shall receipt therefor." (Revised Statutes, 1866, p. 24, ch. 4, sec. 18.) These provisions, amended by the insertion of the word "state" instead of "territory," have been continued in force to this date (see sec. 2, art. 4, ch. 83,

Compiled Statutes) and were, previous to the act of 1891, the only express provisions governing the keeping and accounting for of state funds aside from that contained in section 21, chapter 10, Compiled Statutes, viz.: "Any officer or other person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond," etc. It is not claimed that these provisions even impliedly prohibit the depositing for safe-keeping of the state's money, and it was not claimed at the trial, and could not have been under the issues, that the deposit was made for any other purpose; and it is for that purpose wholly immaterial whether Hill in the transaction in question acted in the capacity of a trustee so that the legal title to the money deposited remained in the state, or whether his relation to the state was that of a debtor only, since in either case his liability is measured by the conditions of his bond.

This conclusion leads naturally to the next and most important subject of inquiry, viz., the extent to which, if at all, the discretion of public officers in the preservation of money entrusted to them for safe-keeping is restricted or controlled by the prohibition of the Criminal Code above set out. That provision is found in chapter 16 of the act which took effect September 1, 1873, entitled "An act to establish a Criminal Code." (General Statutes, 1873, p. 719, ch. 58.) The power of the legislature under a title like the above, to create new and distinct offenses, is not doubted. It is also true, as claimed, that where the law denounces as criminal an act,—particularly one which is contrary to public policy, or, as said in *State v. Keim*,

against the spirit and policy of our government,— it will be regarded as if expressly prohibited and cannot be made the basis of an action at law or in equity; but the application of such a provision, like other acts of the legislature, is always a subject for judicial construction. The evident design of the section under consideration was to prevent the use by the class of officers therein mentioned of the public funds for the purpose of speculation, and not as an amendment of existing laws pertaining to the manner in which such funds were required to be kept and accounted for. It is true that the general deposit of money in bank is, for some purposes, regarded as a loan, since the relation thereby created is that of debtor and creditor; but that the word “loan” has any such comprehensive meaning in the connection in which it is employed in the Criminal Code, I cannot admit. In my judgment the expression “or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money” (Criminal Code, sec. 124), applies to and includes those cases only in which the conventional relation of borrower and lender exists, and can have no reference whatever to a deposit made solely for the purpose of preserving such funds. Before examining that subject in the light of authority, let us see what are the facts disclosed by this record. Practically the only evidence of Hill’s purpose, or of the conditions upon which the money was deposited in this instance, is found in the certificates of deposit issued by the bank, which are identical in form, except as to amounts, and of which one is here set out:

"CAPITAL NATIONAL BANK. \$35,357.85.

LINCOLN, NEB., Jany. 6, 1893.

"State Treasurer of Nebraska has deposited in this bank thirty-five thousand three hundred fifty-seven 85-100 dollars, payable to the order of himself on return of this certificate, properly indorsed. Not subject to check.

"C. W. MOSHER, *President.*"

Law's Estate, 144 Pa. St., 499, was a proceeding to surcharge the account of a guardian to the amount of certain funds of the ward lost by reason of the failure of a bank, and turned upon the question whether the deposit thereof by the guardian amounted to a loan or investment of such funds. In the opinion of the court, which contains a review of the cases in that state, we observe the following language: "Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a bank for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. * * * In the present case the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest until a suitable investment could be found. * * * It is true that two weeks' notice was to be given of the

withdrawal of the deposit, but this was a reasonable provision and not inconsistent with a bank deposit. * * * A deposit, as we have said, is a temporary disposition of money for safe-keeping, and it is upon this ground alone that the trustee is justified in depositing trust funds in bank, and it is upon the same ground that a deposit is distinguishable from an investment." And the right to deposit trust money, as such, in bank while awaiting an opportunity for investment, or when from the necessities of the case such deposit is required in order to preserve it, is generally, if not universally, recognized. (*Churchill v. Hobson*, 1 P. Wms. [Eng.], 241; *Adams v. Claxton*, 6 Ves., Jr. [Eng.], 226; *Fenwick v. Clarke*, 31 L.J.Ch., n.s. [Eng.], 728; *Wilks v. Groom*, 3 Drew [Eng.], 584; *Norwood v. Harness*, 98 Ind., 134; *McCabe v. Fowler*, 84 N. Y., 314; *In re Hunt*, 141 Mass., 515; 1 Lewin, Trusts, *295, 296; note to *Brice v. Stokes*, 2 White & T. L. Cas. [Eng.], 987.)

The question here involved was presented in *State v. McFetridge*, 84 Wis., 473, in the construction of a statute authorizing the investment by the treasurer of certain public funds with the consent of the governor, and of other funds by the commissioner of public lands, and expressly prohibiting the investment of any state funds except as therein provided. It was contended that the deposit by the treasurer of state funds in bank, without the consent of either of the officers above named, was an investment thereof within the meaning of the statute and accordingly unlawful; but the court, by Lyon, C. J., in disposing of that contention, say: "The distinction between a general deposit of money in a bank payable at any time on demand, and an invest-

ment of such money, is plain and substantial. By such deposit the depositor does not lose control of the money, but may reclaim it at any time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value," and after remarking that the treasurer by an investment under the statute loses control over the funds the learned judge continues: "The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an investment thereof, as those terms are used in the statutes."

By reference to the foregoing certificate of deposit it will be perceived that the transaction here involved differs from an ordinary general deposit in one respect only, viz., that the money of the state in the Capital National Bank was payable upon the return of the certificates, and not subject to check. It is therefore directly within the reasoning of the cases cited. But the legislature could not, by the adoption of the Criminal Code, have intended to require the impounding of public funds in specie in the vaults of the treasury for another and sufficient reason, viz., that the state had then, as it has now, no sufficient vault in which to securely keep them. We take notice, too, for it is a matter of common notoriety that treasurers have never kept the funds of the state in actual cash in the vaults of the treasury, and we may safely assume that they will never be so kept, since no treasurer could give the required bond who was suspected of an intention to entrust the millions for which

he is accountable to the utterly insufficient security provided therefor by the state. A change so radical as to amount almost to a revolution of the financial policy of the state and which must result in multiplied embarrassments, owing to the inadequate provisions for investment of our rapidly increasing school fund, should not be sanctioned upon any such doubtful ground as an amendment of the Criminal Code, designed to prevent the embezzlement, by officers, of public funds entrusted to them for safe-keeping.

It was said by this court in *Chaplin v. Lee*, 18 Neb., 440, that to constitute embezzlement (in that case of public funds), it is essential that the owner be deprived of the property mentioned, by an adverse use or holding. According to the settled rule of construction, like terms in penal statutes are presumed to have been used according to their ascertained sense and meaning. (Endlich, Interpretation of Statutes, sec. 75.) And the doctrine that an act of a public officer, not expressly prohibited or contrary to public policy done in good faith to enable him to execute his trust, by preserving the funds committed to his custody, is punishable as an embezzlement in this state is, it would seem, the *reductio ad absurdum* of the rule heretofore asserted.

Although this opinion has been protracted much beyond the limit intended, I cannot dismiss the subject without a further reference to *State v. McFetridge*, *supra*. It was by statute of Wisconsin in one section made the duty of the state treasurer, under a severe penalty, to pay out, or deliver to persons entitled thereto, the same identical coin and currency paid into the treasury, and by another section, to keep such coin and

currency in the vaults of the treasury until lawfully paid out. By a third section it was made the duty of the governor and attorney general, at least once in each quarter, to examine and see that all money shown by the treasurer's books to belong to the state was in the vaults of the treasury, and in case of deficiency, to require the treasurer to immediately supply the amount thereof. The chief justice, after holding that the section first above mentioned was designed, when adopted in 1858, to prevent the payment of state debts in depreciated money, concludes as follows: "The better view is, we think, that if the public creditors receive directly from the hands of the treasurer or from banks, on the treasurer's draft, money having the same value and essential qualities as that paid into the treasury, the treasurer does pay out 'the same moneys received and held by him by virtue of his office,' within the meaning and intention of the statutes." And referring to the second section the same judge says: "It is argued that the term * * * 'money,' as employed in the statute, means the actual coin and currency of the country. This construction is, we think, too narrow, for it ignores the customary and necessary processes universally employed in the conduct of business affairs, and the methods by which the business of the treasurer's office has been conducted from its first organization. * * * The construction of section 159 contended for would require the treasurer to demand that the revenues of the state should be paid to him in lawful money, that is, legal tender funds, or else would compel him to collect such checks, drafts, or certificates of deposit in lawful money, and place the proceeds and other money thus

received by him in the vault in his office in order to be prepared for the official inspection of the governor and attorney general. It is impossible to impute any such absurd intention to the legislature. It may be conceded for the purposes of the case that such restricted construction of the statute in respect to what is meant by the vaults of the treasury is the correct one, * * * but we cannot agree that the word 'money' as there employed means only the actual coin and currency in circulation as money. Such a construction would be extremely technical, and is, we think, uncalled for. 'Money' is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium or any instrument or token in general use in the commercial world as the representatives of value. It includes whatever is lawfully and actually current in commercial transactions, as the equivalent of legal tender coin and currency. * * * Certificates of deposit or other vouchers for money deposited in solvent banks, payable on demand, are a most convenient medium of exchange and are extensively used in commercial and financial transactions to represent the money thus deposited. * * * Hence the same are 'money' within the meaning of section 159, and its requirements in that behalf were complied with by the treasurer if * * * [there is] found in the 'vaults of the treasury' the amounts called for by the books of the secretary of state and treasurer, although portions thereof were in such certificates or vouchers." Cooley, C. J., in discussing the precise question here presented in *City of Lansing v. Wood*, 57 Mich., 201, uses this language: "If Wood had first drawn the money from the

bank, and Edmunds [his successor] had taken and immediately deposited it, the latter unquestionably, if he had a right to the moneys, would have taken upon himself all risks. What difference it can make that the parties did not count out the money and then count it in again, I do not perceive. It is manifest that all parties at the time understood that the fund had been transferred to Edmunds, and it is certain that he had all the evidences of right, and the complete and absolute control."

The foregoing comprehensive definition of the term "money" as there employed accords with the views of other writers and appears to be altogether reasonable. (*Vide Webster's Dictionary; Century Dictionary; Paul v. Ball*, 31 Tex., 10; *Kennedy v. Briere*, 45 Tex., 305; *Taylor v. Robinson*, 34 Fed. Rep., 678.)

It is necessary to here again briefly refer to some of the cases of which mention has been made from this court. In *Cedar County v. Jenal* the decision was apparently right upon the facts, there being evidence tending to prove that the certificates of deposit there involved were accepted, not as in this case, in payment, but for collection as credit only, by Howard, the defendant's successor in office. In *State v. Hill* the controlling question was whether the alleged breach of his official bond, by the principal defendant, occurred in Douglas county or Lancaster county, jurisdiction being claimed in behalf of the district court for the first named county, by reason of the deposit by Hill as treasurer of state funds, in certain banks in the city of Omaha. The petition distinctly charged a loan of the money so deposited, and which allegation was for the purpose of

the objection to the jurisdiction of the court taken as true; and what was in fact decided is that Hill, in withdrawing state funds from the vaults of the treasury for the purpose of unlawfully loaning the same, as alleged, in the city of Omaha, was thereby, *eo instanti*, guilty of conversion, whether in the consummation of his purpose such funds were subsequently loaned in Douglas county or elsewhere. The question here presented was not involved in that case, the language quoted therefrom in apparent conflict with the views here expressed being responsive to the arguments of counsel for the respective parties, and should, as evidently intended, be regarded as *obiter* only.

I fully appreciate the importance of the doctrine *stare decisis*, and with what reluctance courts consent to the reversal of rules established by repeated decisions, although confessedly erroneous, particularly such as have become rules of property. In such cases, according to the dictates of common justice, they should be adhered to until changed by statute. There are, it is true, to be found cases holding that the same principle is applicable to all statutory constructions, whether involving rules of property or mere questions of practice; but such a consecration of the doctrine of *stare decisis* is opposed to reason and the overwhelming weight of authority. That rule, like all others, is not without its exceptions, and, in the absence of complications resulting from property rights, it is the undoubted privilege, if not indeed the duty, of courts to re-examine their decisions whenever satisfied that they are fundamentally wrong. Such decisions ought, in the language of Chan-

cellor Kent, "to be examined without fear and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." (1 Kent, Commentaries, *477; Black, Interpretation of Laws, 403, 404; Endlich, Interpretation of Statutes, sec. 363.) It is certainly not discrediting the wisdom of our predecessors to hold, as must eventually be done, that the doctrine running through the cases cited is unsound in principle and unjust alike to the state, to its servants, and to the public at large, for time and experience are, after all, the logic by which to judge rules of law as well as morals, and our fondest hope is that our work may, when tried by that infallible test, be found equal in point of merit to theirs.

To repeat, the motion for a new trial should be denied and the cases mentioned, so far as they conflict with the rules herein stated, should be overruled.

IRVINE, C.

In my opinion the verdict rendered is the only one which could properly be rendered under the evidence; and it is therefore unnecessary to consider whether or not the instructions given were in all respects technically correct. Brevity, in so far as the importance of the questions presented permits, is imperative, and I shall therefore, in stating my views, omit references to the numerous authorities which have been consulted upon the consideration of interlocutory applications, and during the two trials of the case; nor do I feel that I would be warranted in any very extended presentation of the reasons for my own conclusions.

The case of the state rests entirely on the generally accepted construction of the case of *Cedar County v. Jenal*, 14 Neb., 254. That doctrine is that it is the duty of treasurers to keep all funds committed to their custody in specie; and that their obligations can only be satisfied by the payment to their successors of all undisbursed funds by the delivery "of that which by the law of the land is recognized as money." The phrase quoted is certainly somewhat vague; but according to the state's construction thereof,—and this construction is warranted by the *Jenal Case*,—checks, certificates of deposit, and instruments of like character do not come within the requirement of the law, although the commercial world may regard them as so far partaking of the characteristics of money that their acceptance in lieu thereof may bind individuals in private transactions. It is to my mind somewhat doubtful whether the present case presents a state of facts similar to those before the court in the *Jenal Case*. In this case there is no doubt that Hill not only tendered to his successor certificates of deposit in lieu of money, but his successor actually accepted those representing the deposit in the Capital National Bank. Two certificates of other banks he refused to accept, whereupon Hill delivered money in lieu of them. In the *Jenal Case* the plea was that instead of delivering the money to his successor, Jenal paid it to a foreign banker at his successor's direction, and delivered certificates evidencing such payment to the successor; and that the successor had accepted such acts as payment to him. The report of the case discloses that the successor denied having agreed to accept the certificates. What the evidence was otherwise on this question

does not appear. I would have no doubt that nothing short of the actual acceptance of the certificates by the successor would operate as a discharge. Conceding, however, that this case does fall within the principle of the *Jenal Case*, or rather that the facts of the *Jenal Case* were broad enough to render the doctrine there announced direct authority as applied to this case, still I think the state has entirely failed to prove the breach of the bond alleged in its petition. If a treasurer is entitled to credit for disbursements or the delivery to his successor only when "that which by the law of the land is recognized as money" has been disbursed or delivered, it would seem to follow necessarily that he is chargeable as for money only when he has received "that which by the law of the land is recognized as money." If Hill is not entitled to credit for the certificates which Bartley accepted from him, how can it be said that Bartley is chargeable with those certificates as money, and how can it be said that Hill is chargeable as for money received with any paper or credits received at the commencement of or during his term of office? The evidence shows that but a very small portion of the deposits made in the Capital National Bank were of money, and there was drawn from the bank in money and lawfully disbursed by Hill more than the money deposits. The balance remaining in the bank at the close of his term was created solely by the deposit of instruments which under the rule in the *Jenal Case* were not money in Hill's hands. If the *Jenal Case* should be followed at all, it must be followed to its full extent and be applied on one side of the account as well as on the other; and this must be

true of the receipts and deposits made during Hill's term of office, as well as of the balance received by him from his predecessor. If the rule is to be so applied, not a dollar with which Hill is chargeable as for money was traced into the account, except as it was traced out again under circumstances entitling Hill to credit therefor. The question of the application of the payments by the bank is therefore entirely immaterial. So that I concur with Commissioner RYAN in his opinion that upon the state's own theory of the case it cannot complain of the verdict. On that theory it may be that a treasurer commits a breach of duty when he does not insist on having all payments made to him in money, and that it was a breach of the bond for Hill to receive from his predecessor and from debtors of the state during his term things other than money; but the state did not frame its petition on that theory. It charges no such breach. On the contrary, it charges Hill in express language with the receipt of all sums in money. But for my own part I would not be prepared to let the decision rest on so technical a view, especially as I entertain the doubt alluded to as to the real extent of the doctrine of the *Jenal Case*; and as I entertain a great deal more than a doubt as to the correctness of that doctrine if it goes to the extent which the state must claim for it in order to support its action. In other words, I believe that the incoming treasurer represented the state in accounting with his predecessor; and if he received, as the evidence shows he did, these certificates in satisfaction of so much of the state's claim against Hill, the state was bound by his action. If such action was improper and the state suffered a loss

thereby, the remedy would not be against Mr. Hill. Hill parted with the certificates on the faith of his successor's accepting them. He lost their possession. He lost their legal title. In the week or more which elapsed between the delivery of the certificates to Mr. Bartley and the failure of the bank, Hill had no control over the deposit, and was utterly powerless by any act of his to obtain payment from the bank and defeat the loss. The state had provided no means whereby the treasurer could safely keep in specie the moneys of the state. Indeed, it has become impossible for the state to conduct its business transactions by barbarous or mediæval methods. Its business is too vast and too much interwoven with the private business of its citizens to permit it to entirely ignore the universal usages of commerce. Whether it will or not, it is forced to more or less adapt itself to these usages. I think our statutes relating to the business operations of the state should be construed as having been adopted with reference to the prevailing commercial customs; and the proposition that Hill and his bondsmen should be held liable for the loss in this case, under all its circumstances, must appear to any man at all versed in commercial or financial transactions as harsh, unreasonable, and unjust.

I think there is another reason why this verdict should not be set aside, which is perfectly conclusive. What is known as the depository law went into effect at the expiration of Hill's term,—that is, not later than January 14, 1893. Under this statute, banks may present their bonds to the state for the security of state moneys deposited. These bonds are submitted to a board consisting

of the governor, secretary of state, and attorney general for approval. Upon the approval of such a bond the bank becomes a recognized state depository. The treasurer is not only permitted, but he is required, to keep all the current funds in his hands on deposit in these designated banks, and he is subject to indictment and punishment if he willfully fails to do so. He is expressly by the statute relieved from liability on account of loss of money while so deposited. This was the law when Mr. Bartley's term of office began; and on that day, January 14, 1893, the governor, secretary of state, and attorney general approved such a bond tendered by the Capital National Bank in the sum of \$700,000. This must have been one of the first, if not the very first, bonds approved; and the treasurer was thereby authorized to deposit in the Capital National Bank \$350,000. It is fair to presume that at that time the condition of the treasury was such as technically to require a deposit of that full amount. On the 16th of January Mr. Bartley indorsed the certificates of deposit received from Hill and caused them to be delivered to the bank, and opened a general account with the bank under the depository law, receiving on behalf of the state credit thereon for the amount of these certificates, which were retained by the bank and canceled. Between the 16th and the 21st of January about \$49,000 was withdrawn by check from this account. There can be no doubt that at that time Mr. Bartley was authorized to deposit that amount of money in the bank. There can be little doubt that the law required him to do so. Whether he was authorized to receive credit in the bank by transfer from Hill or not, he was authorized to receive a credit by

deposit thereafter. The state by this act became the creditor of the bank to the amount of the certificates, and there can be no doubt that from the moment that deposit was made all remedies upon the certificates were lost. Neither Hill nor Bartley had any longer any right thereto or interest therein. There was a complete novation. The bank discharged its liability to the holder of the certificates by assuming with the consent of the state an equivalent liability to the state. To this position the state makes two answers. In the first place it says that the depository law is unconstitutional. In the second place it says that the bank was at the time of the deposit insolvent; that the certificates were worthless and therefore did not operate as a valid deposit.

In answer to the first contention it may be said that in *Hopkins v. Scott*, 38 Neb., 661, a number of constitutional objections to the act were considered, and it was held that it was not bad for any of the reasons then suggested. The state now presents an additional objection arising out of section 22, article 3, of the constitution, providing, among other things, that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." It is argued that this law contemplates the withdrawal of money without an appropriation and without a warrant. The provision quoted, however, manifestly applies to the ultimate disbursement of moneys in payment of claims against the state, and has no reference to any provisions which the legislature might see fit to make in regard to the custody or investment of money while in the treasury awaiting disbursement.

The second argument is not, in my opinion, sound. No question is presented of fraud on the part either of Mr. Hill or Mr. Bartley. It is not pretended that either knew the bank was insolvent. The state was willing that its money should be lent to the bank, and the state's officers had approved security offered by the bank as satisfactory. It must be admitted that had Bartley deposited money to the amount for which he obtained credit at the bank, such a deposit would have been lawful. If he had presented the certificates to the paying teller, had received payment thereof in money, and had immediately redeposited that money with the receiving teller, there could be no doubt of the validity of the deposit. I cannot see that the situation is changed because that process was not adopted. If A gives to B his check on a bank in payment of a debt, and B deposits the check in the bank on which it is drawn and receives credit on his own account for the amount of the check, the amount being at the same time charged to A by the bank, is not the debt from A to B satisfied, there being no fraud in the transaction, both men believing the bank good, even though it does afterwards develop that the bank was insolvent? In that case it was B who gave credit to the bank and who took the risk of its insolvency. He was willing to accept the bank as his debtor. The case is very different from that suggested in argument, of the deposit in one bank of a check drawn on another which fails before the check is collected. In the latter case the payee of the check has not accepted the bank on which it was drawn as his general debtor. The payment is in such case conditional at best. This case is precisely analogous to that first supposed;

and I think that whatever may have been the law before the depository act took effect, the state is now in the banking business and in its banking transactions acquires the same rights and subjects itself to the same liabilities as an individual. There is no possible doubt that the state for this money has a remedy upon the depository bond given by the bank. If the sureties on that bond were insufficient, the responsibility certainly does not rest upon Mr. Hill or his sureties.

On this aspect of the case I think the decision of the court and the reasoning of Judge LAKE in *Hughes v. Kellogg*, 3 Neb., 186, is directly in point and conclusive.

HARRISON, J.

I concur in the doctrine announced in paragraphs 11, 12, 16, and 18 of the syllabus to the opinion in this case written by Chief Justice POST, also in what is stated in paragraphs 2, 4, 7, 8, and 10 of the syllabus of the opinion written by NORVAL, J., of which I call attention to Nos. 7 and 8, stating:

“7. The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank.

“8. Held, that the record discloses such a ratification in this case.”

I also agree with Commissioner IRVINE in the statement that “The deposit by Bartley, under the depository law, of the certificates received by him from Hill in the same bank which issued them, the cancellation of the certificates, and the state’s accepting a credit on open account, operated a novation, made the bank the state’s debtor, and

released Hill from liability;" and also agree with the conclusion of Commissioner RYAN, that under the issues presented in the cause there was sufficient evidence to sustain the verdict rendered, and it must therefore stand.

RAGAN, C.

I agree with the conclusion of RYAN, C., that the motion for a new trial must be overruled and judgment entered for the defendants. I also concur in the views expressed by the chief justice, and entirely agree with IRVINE, C., that "The deposit by Bartley, under the depository law, of the certificates received by him from Hill, in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account for their amount, operated a novation, made the bank the state's debtor, and released Hill from liability." I also concur in points 2, 4, and 10 of the syllabus of the opinion by NORVAL, J.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. STATE OF NEBRASKA, EX REL. CITY OF OMAHA.

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FILED MARCH 18, 1896. No. 7805.

1. **Police Power.** The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.
2. ———. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connec-

tion between the actual provisions of such measures and their assumed purpose.

3. **Constitutional Law: PROPERTY RIGHTS: PUBLIC USE: DUE PROCESS OF LAW.** "Due process of law," as the term is used in the state and federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.
4. **Legislature: PUBLIC WELFARE: CONTRACTS.** The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise.
5. **Municipal Corporations: POLICE POWER.** Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.
6. **Statutes: PROPERTY RIGHTS: COURTS.** The power of the legislature over private property is not absolute. But while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making power of the government respecting the wisdom or necessity of particular measures.
7. **Municipal Corporations: RAILROAD COMPANIES: VIADUCTS: REPAIR.** The provision of the charter of the city of Omaha (Compiled Statutes, ch. 12a, sec. 48), authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein, crossed by their tracks, is a valid exercise of the police power of the state.
8. **City Ordinances: RAILROAD COMPANIES: VIADUCTS: CONTRACTS.** Ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city, *held*, not to violate prior contract obligations.

9. ———: ———: ———: REPAIRS: PARTIES. Nor is such ordinance void as against the railroad companies therein named as the owners of said roads for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.
10. **Mandamus: RAILROAD COMPANIES.** The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of *mandamus*.

ERROR from the district court of Douglas county. Tried below before AMBROSE, J.

The opinion contains a statement of the case.

C. J. Greene, for plaintiff in error:

The provisions of section 48 of the city charter do not apply to viaducts existing at the time they went into operation, but to those only to be thereafter constructed. (*Chew Heong v. United States*, 112 U. S., 559; *State v. Stein*, 13 Neb., 530; *Bart-ruff v. Remey*, 15 Ia., 257; *McIntosh v. Kilbourne*, 37 Ia., 420; 2 Dillon, Municipal Corporations, sec. 1018; *City of Lincoln v. Walker*, 18 Neb., 244; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Foxworthy v. City of Hastings*, 25 Neb., 133; *City of Lincoln v. Smith*, 28 Neb., 762; *Kinney v. City of Tekamah*, 30 Neb., 605; *City of Omaha v. Randolph*, 30 Neb., 699; *Watson v. Tripp*, 11 R. I., 98.)

The provisions of the ordinance authorize the taking of respondent's property without due process of law and also impair the obligations of the contracts under which the respondent's track was located and the viaduct constructed. (*Edwards v. Kearzey*, 96 U. S., 595; *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S., 650; *Slaughter*

House Cases, 16 Wall. [U. S.], 62; *Stone v. Mississippi*, 101 U. S., 814; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. [U. S.], 116; *The Binghamton Bridge*, 3 Wall. [U. S.], 51; *West River Bridge Co. v. Dix*, 6 How. [U. S.], 531; *Pontchartrain R. Co. v. Orleans Navigation Co.*, 15 La., 413; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann., 147; *St. Anna's Asylum v. City of New Orleans*, 105 U. S., 368; *Home of the Friendless v. Rouse*, 8 Wall. [U. S.], 430; *New Jersey v. Wilson*, 7 Cranch [U. S.], 166; *State Bank of Ohio v. Knoop*, 16 How. [U. S.], 376; *Gordon v. Appeal Tax Court*, 3 How. [U. S.], 133; *Wilmington & R. R. Co. v. Reid*, 13 Wall. [U. S.], 266; *Humphrey v. Pegues*, 16 Wall. [U. S.], 248; *Farrington v. Tennessee*, 95 U. S., 689; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. [U. S.], 428; *Ward v. Farwell*, 97 Ill., 593; *Coast Line R. Co. v. City of Savannah*, 30 Fed. Rep., 646; *State v. Corrigan Consolidated Street R. Co.*, 85 Mo., 263; *Illinois C. R. Co. v. City of Bloomington*, 76 Ill., 447; *Sioux City Street R. Co. v. Sioux City*, 138 U. S., 98; *Peck v. Chicago & N. W. R. Co.*, 94 U. S., 164; *Boston Beer Co. v. Massachusetts*, 97 U. S., 25; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S., 663; *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U. S., 746.)

The respondent is under no legal duty to make the repairs in question, for the reason that in the proceedings of its council to impose such duty or obligation the relator has failed to observe the requirements of section 48 of the city charter.

If the act under consideration can be justified, it must be as an exercise of that power which abides with the state to be used when necessary to secure the public safety. (*County of Santa Clara*

v. Southern P. R. Co., 18 Fed. Rep., 392; *Newland v. Marsh*, 19 Ill., 376; *Bigelow v. West Wisconsin R. Co.*, 27 Wis., 478; *Dow v. Norris*, 4 N. H., 16; *City of Dubuque v. Illinois C. R. Co.*, 39 Ia., 56; *People v. Supervisors of Orange County*, 17 N. Y., 235; *Boisdere v. Citizens Bank*, 29 Am. Dec. [La.], 453.)

A hearing, or an opportunity for one, is essential to the validity of the act and the proceedings under it. (*Hagar v. Reclamation District*, 111 U. S., 701; *Barhyte v. Shepherd*, 35 N. Y., 238; *Hassan v. City of Rochester*, 67 N. Y., 528; *Stuart v. Palmer*, 74 N. Y., 183; *Williams v. Weaver*, 75 N. Y., 30; *Jordon v. Hyatt*, 3 Barb. [N. Y.], 275; *Ireland v. City of Rochester*, 51 Barb. [N. Y.], 416; *State v. City of Jersey City*, 24 N. J. Law, 662; *State v. Town of Morristown*, 34 N. J. Law, 445; *Griffin v. Mixon*, 38 Miss., 434; *Overing v. Foote*, 65 N. Y., 269; *Thomas v. Gain*, 35 Mich., 155; *State v. City of Plainfield*, 38 N. J. Law, 97; *Patten v. Green*, 13 Cal., 325; *San Mateo County v. Southern P. R. Co.*, 8 Sawy. [U. S. C. C.], 238; *Darling v. Gunn*, 50 Ill., 424; *Gatch v. City of Des Moines*, 63 Ia., 718; *Trustees v. City of Davenport*, 65 Ia., 633; *Ulman v. Mayor of City of Baltimore*, 21 Atl. Rep. [Md.], 711; *Boorman v. City of Santa Barbara*, 4 Pac. Rep., [Cal.], 31; *Campbell v. Dwiggins*, 83 Ind., 473; *State v. Mayor of City of Newark*, 25 N. J. Law, 399; *City of St. Louis v. Hill*, 22 S. W. Rep. [Mo.], 861; *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948; *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. Board of Administrators of New Orleans*, 96 U. S., 97.)

Notice must be given to persons interested. (*Hess v. Cole*, 3 Zab. [N. J.], 116; *Coster v. New Jersey Railroad & Transportation Co.*, 3 Zab. [N. J.], 227; *Vail v. Morris & E. R. Co.*, 1 Zab. [N. J.], 191;

In re Flatbush Avenue, 1 Barb. [N. Y.], 286; *Owners of Ground v. Mayor of City of Albany*, 15 Wend. [N. Y.], 374; *Vantilburgh v. Shann*, 4 Zab. [N. J.], 740; *Kirby v. Shaw*, 19 Pa. St., 258; *Schenley v. Commonwealth*, 36 Pa. St., 29; *McGonigle v. Alleghany City*, 44 Pa. St., 118; *In re Washington Avenue*, 69 Pa. St., 360; *City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law, 385; *Tide-water Co. v. Coster*, 18 N. J. Eq., 519; *In re Drainage of Lands*, 35 N. J. Law, 497; *St. John v. City of East St. Louis*, 50 Ill., 92; *In re Albany Street*, 11 Wend. [N. Y.], 149; *Litchfield v. Vernon*, 41 N. Y., 123; *Brady v. King*, 53 Cal., 45; *Taylor v. Palmer*, 31 Cal., 240.)

Conceding that the respondent is under a legal duty or obligation to make the repairs, there is no statute, either special or general, conferring upon the courts authority to compel the discharge of such duty or obligation by writ of *mandamus*. (*State v. Grand Island & W. C. R. Co.*, 27 Neb., 694; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412; *State v. St. Paul, M. & M. R. Co.*, 35 Minn., 131, 38 Minn., 246; *State v. Minneapolis & St. L. R. Co.*, 39 Minn., 219; *Trumble v. Trumble*, 37 Neb., 346; *State v. Smith*, 35 Minn., 257; *Gaal v. Townsend*, 77 Tex., 464; *Lyon v. Rice*, 41 Conn., 245; *State v. Jones*, 1 Ired. Law [N. Car.], 129; *Knight v. Ferris*, 6 Houst. [Del.], 283.)

J. W. Dewecse, also for plaintiff in error.

W. J. Connell, *contra*:

The remedy by *mandamus* is given by section 645 of the Code "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

Railroad companies hold "trust or station" within the meaning of the Code. (*State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412; *State v. Grand Island & W. C. R. Co.*, 27 Neb., 694, 31 Neb., 213; *State v. Missouri P. R. Co.*, 5 Pac. Rep. [Kan.], 772; 14 Am. & Eng. Ency. of Law, 158.)

The remedy was especially conferred in this class of cases by charter provision, and the act is valid. (*Dogge v. State*, 17 Neb., 140; *State v. Babcock*, 23 Neb., 130; *State v. Berka*, 20 Neb., 375; *In re White*, 33 Neb., 813; *Smails v. White*, 4 Neb., 353; *State v. Arnold*, 31 Neb., 75; *Smith v. State*, 34 Neb., 691.)

The relator has a clear legal right to be enforced. (*State v. Missouri P. R. Co.*, 5 Pac. Rep. [Kan.], 772; *Hagar v. Reclamation District*, 111 U. S., 701; *State v. Stearns*, 11 Neb., 104; *Indianapolis & C. R. Co. v. State*, 37 Ind., 489; *Habersham v. Savannah & Ogeechee Canal Co.*, 26 Ga., 665.)

POST, C. J.

This was a proceeding on the relation of the city of Omaha to require the Chicago, Burlington & Quincy Railroad Company, hereafter referred to as the "respondents," to repair the south one-third of the so-called Eleventh street viaduct, in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has, by appropriate proceedings, been removed into this court for review.

It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the state and the city so far as it relates to the subject of the controversy, and in so doing

we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha & Southwestern Railroad Company was organized under the general statutes of this state, and immediately thereafter constructed a line of road from the city of Omaha, in a southwesterly direction, to a point on the Platte river in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington & Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the state of Illinois. Section 83, chapter 25, Revised Statutes, 1866, under which the Omaha & Southwestern Company was organized, contained among other provisions the following:

“Sec. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied.”

In the year 1884 application was by the last named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and in response to that request an ordinance, No. 729,

was enacted and approved in the following language:

“Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain, and operate a line of railroad along, upon, through, and across said portion of said streets and alleys as a part of its line; *Provided*, That said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; *And provided*, That nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company, in any portion of the streets and alleys herein named and enumerated.”

Pursuant to said ordinance the respondent soon thereafter constructed a track from Tenth street across Eleventh street, and thence in a southwesterly direction to the city limits. Long previous to the last mentioned date the Union Pacific Railway Company had, with the consent of the city, constructed twenty-one or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street.

By sections 1, 2, and 4 of an act entitled “An act to provide for viaducts, bridges, and tunnels, in

certain cases, in cities of the first class," approved March 4, 1885 (Session Laws, 1885, p. 109, ch. 12), it was declared:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley, or highway thereof; in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge, or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of the entire cost thereof, and three-fifths (3-5) of all damages to abutting property on account of construction of said viaduct, bridge, or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1-5), then the said mayor and council may proceed to contract with the neces-

sary party or parties for the construction of such viaduct, bridge, or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1-5) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

“Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge, or tunnel.”

In virtue of the foregoing provisions the city, the Union Pacific Company, and the respondent, in the year 1886, entered into an agreement in writing, the essential part of which is as follows:

* * * “Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled ‘An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class,’ do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting

property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars (\$90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. * * *

“The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.” * * *

Pursuant to that agreement the viaduct in question was constructed and dedicated to the use of the public early in the year 1887. In the year last named a new charter was provided for the city by an act entitled “An act incorporating metropolitan cities and defining and prescribing their duties, powers, and government” (Session Laws, 1887, p. 105, ch. 10), section 48 of which, as amended in 1893, reads as follows:

“Sec. 48. The mayor and council shall have power to require any railway company or com-

panies owning or operating any railway tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * *

When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct, or repair any viaduct, to proceed, within the time and in the manner required by the mayor and council, to erect, construct, reconstruct, or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect, or refuse to perform such duty, and upon conviction such company or companies shall be fined one hundred dollars (\$100), and each day any such company or companies shall fail, neglect, or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by *mandamus* or other appropriate proceedings to erect, construct, reconstruct, or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power, whenever any railroad company or companies shall fail, neglect, or

refuse to erect, construct, reconstruct, or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction, or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, reconstruction, or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct, or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court." (Session Laws, 1893, p. 70, ch. 3, sec. 7.)

In the month of January, 1894, the relator, having determined from the report of the city engineer, the board of public works, and other competent evidence that extensive repairs were required upon said viaduct by reason of structural weakness thereof and other causes, enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which read as follows:

"Sec. 2. That the Union Pacific Railway Company be and is hereby, ordered, directed, and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct, and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is

hereby ordered, directed, and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

"Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was in due form served upon the respondent as well as upon the Union Pacific Railway Company, and upon the refusal of the former to comply with the terms of the ordinance this proceeding was instituted, with the result stated.

The first proposition asserted by the respondent is that section 48, above set out, has a prospective operation only, and does not in terms or by implication apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a retrospective law. A statute does not operate retroactively from the mere fact that it relates to antecedent events. A

retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence. (Bishop, *Written Laws*, sec. 83; Black, *Interpretation of Laws*, p. 247.) The language employed in the statute is "any viaduct or viaducts," and must, when read in the light of the authorities cited, be held to include such as were then in existence as well as those subsequently constructed.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument, and the subject will not therefore be further pursued in this connection.

The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed. The diffi-

culty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the state, and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain; nor is the confusion on that account at all strange when we remember that those powers all depend for their vitality upon a common principle, viz., the subordination of private rights to the public welfare—of the individual to the community. Of the cases frequently cited to illustrate that principle many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the police power have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. [Mass.], 53, “much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise.” Doubtless the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller in *Davidson v. City of New Orleans*, 96 U. S., 97, as “the gradual process of judicial inclusion and exclusion.” We held in *Smiley v. McDonald*, 42 Neb., 5, that the legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both state and

municipal, is to promote the convenience and safety of the public at a grade crossing which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case and need not be here cited. The questions presented by this assignment are in principle nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character, and, to use the language of the respondent, "Such a proceeding, without notice to those concerned, and without giving them an opportunity to be heard, violates every maxim and principle of constitutional government." The term "due process of law" is, like the police power of the state, not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz., "Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." In *Board of Directors v. Collins*, 46 Neb., 411, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it

is satisfied whenever the citizen, whose property is taken or damaged for public use, is afforded an adequate remedy therefor in a court of competent jurisdiction; and the doctrine is now firmly established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected is not indispensable to a valid exercise of the police power, or the power to levy and collect taxes, whether *ad valorem*, by the ordinary means, or such as are denominated special assessments and chargeable against particular property. In *McMillen v. Anderson*, 95 U. S., 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the state of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present in some tribunal when it was assessed. But this is not, and never has been, considered necessary to the validity of a tax; * * * nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property he can sue the proper party and recover back the money as paid under duress if the tax was illegal." True, it was said in *Barker v. City of Omaha*, 16 Neb., 269, that "notice in some form must be given a property owner before a special assessment upon his property becomes fixed and irrevocable;" but the learned author of that opinion did not say, or imply, that the means

of redress afforded in other cases against illegal assessment fail to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant, and what is the doctrine of the authorities there cited, is, that a property owner shall, before being required to pay, have an opportunity to be heard in the courts, in a proceeding instituted by himself or by the municipality to which the taxing power of the state has been by law entrusted. Although there are many cases in the state and federal courts in harmony with the opinion of Justice Miller, from which the foregoing is quoted, and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power rather than the power of taxation. In *Woodruff v. Catlin*, 54 Conn., 295, it is said: "The legislature having determined that the intersection of two railways with a highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; * * * that the legislature of this state has the power to do all this for the specified purpose, and to do it through the instrumentality of a commission." *Appeal of New York & N. E. R. Co.*, 58 Conn., 532, involved the constitutionality of an act of the leg-

islature limiting the amount chargeable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was entrusted from apportioning to the city a just and equitable share of the burden imposed by the act; but the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by general rule by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself in the discharge of its governmental duties undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through, and at the expense of, the towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the pub-

lic a more expeditious and vastly improved method of travel. * * * Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. * * * They contribute largely to the danger, and the state may well require them to contribute largely to its removal. * * * Requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain." That doctrine was reasserted by the same court in *Appeal of New York & N. E. R. Co.*, 62 Conn., 527, which was upon proceedings in error to the supreme court of the United States affirmed and the validity of the act in question expressly upheld. (See *New York & N. E. R. Co. v. Bristol*, 151 U. S., 556.) In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them [railroad companies] in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States;" and substantially similar views are expressed by

that court in *Missouri P. R. Co. v. Humes*, 115 U. S., 512, and *Eldridge v. Trezerant*, 16 Sup. Ct. Rep., 345. In *Train v. Boston Disinfecting Co.*, 144 Mass., 529, a regulation of the board of health for the disinfecting of certain vessels, and goods imported therein, at the owner's expense, was assailed on the ground that no provision was by law made for a hearing, or for review by appeal or otherwise; but the court pronounced the regulation a reasonable one, and defensible as an exercise of the police power of the state. In *Commonwealth v. Roberts*, 155 Mass., 281, an act required all buildings used for a designated purpose to be supplied with sufficient water closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power and applicable to buildings erected before its enactment as well as to those subsequently constructed. In *People v. Boston & A. R. Co.*, 70 N. Y., 569, the appellant company was required to construct a bridge over a turnpike road, on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare. In *State v. Missouri P. R. Co.*, 33 Kan., 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them [respondents] to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad companies

to contest the validity of the ordinance, and the right of the city to compel them to construct the viaduct, is sufficient." But the clearest and most satisfactory exposition of the subject is found in *Health Department v. Rector of Trinity Church*, 145 N. Y., 32, which was an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families, whenever so directed by the board of health. The statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families whenever so directed by the board of health. The statute made no provision for notice to property owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order." And in answer to the argument that the effect of the act was to impair contract obligations, the same learned judge said: "Laws and regulations of a police nature, though they may disturb the

enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it, by sharing in the general benefits which the regulations are intended and calculated to secure. (See, also, *People v. Union P. R. Co.*, 20 Colo., 186; 37 Pac. Rep., 610; 1 Dillon, *Municipal Corporations* [4th ed.], sec. 141, and note; *Commonwealth v. Alger*, 7 Cush. [Mass.], 83; *Baker v. City of Boston*, 12 Pick. [Mass.], 183; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140; Tiedeman, *Limitations of Police Power*, sec. 124; Prentice, *Police Power*, pp. 57, 58.) And the principle which underlies all of the cases cited was distinctly recognized by this court in *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412. It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the state. (Prentice, *Police Power*, p. 31; *Minnesota v. Barber*, 136 U. S., 313.) But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures. To summarize briefly, we conclude,

from the foregoing authorities and many others examined, that the legislation assailed in this cause is a valid exercise of the police power of the state over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is enabled to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set

out, confers upon the mayor and council of the city plenary powers with respect to the subject. They may by ordinance determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose. But in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St. Paul Railroad Companies, then engaged in operating, jointly with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named, as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly, it is argued that, conceding the respondent's duty to repair the viaduct as commanded by

the ordinance, such duty is not one which will be enforced by means of the writ of *mandamus*. By reference to section 48 of the city's charter it will be observed that authority to proceed by *mandamus* or other appropriate proceedings is therein expressly conferred; but independent of that provision, *mandamus* has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. (See *State v. Republican V. R. Co.*, 17 Neb., 647, 18 Neb., 512; *State v. Grand Island & W. C. R. Co.*, 27 Neb., 694; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412.)

We discover no error in the record and the judgment of the district court is

AFFIRMED.

HANOVER FIRE INSURANCE COMPANY ET AL. V.
MARCUS L. PARROTTE.

FILED MARCH 18, 1896. No. 6300.

Insurance: PROOF OF LOSS: UNOCCUPIED PREMISES. The proof of loss submitted by the plaintiff, in an action upon a policy of insurance, contained this clause, partly written and partly printed: "The building described by said policy, or containing said property, was occupied in its several parts by the parties hereafter named and for the following purposes: Used as a residence by Hill Adair up to 3:30 P. M., September 20, 1890, and for no other purpose whatever." *Held*, Not an admission that the insured property remained unoccupied for ten days thereafter, within the terms of the policy providing that it should be null and void in case the premises insured were at any time unoccupied for more than ten consecutive days.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Thomas D. Crane, for plaintiff in error.

Francis A. Brogan, contra.

POST, C. J.

This was an action upon a policy of insurance, in the district court for Douglas county, where, on a trial of the issues joined, there was a judgment upon a verdict for the plaintiff therein, and which has been removed into this court for review by means of the petition in error of the defendant company.

The property covered by the policy was a story and a half frame dwelling-house situated upon lot 3, in block 6, Hawthorne Addition to the city of Omaha, and was, according to the pleadings, destroyed by fire October 2, 1890. The defense relied upon is the alleged breach of the following condition of the policy: "If the premises described in this policy be unoccupied for more than ten consecutive days, * * * then, and in every such case, this policy shall be void." It is alleged that the premises insured were at the time of the loss, October 2, unoccupied, and had been so unoccupied for more than ten days immediately preceding said date. The reply is a general denial. The plaintiff below introduced in evidence the policy above mentioned, and testified in his own behalf to the loss by fire of the property insured. The defendant thereupon introduced in evidence the proof of loss made and certified by the insured on the 11th day of December, 1890. The plaintiff, in the preparation of said proof, employed a blank

form apparently furnished by the defendant company for that purpose, and which, among other printed matter, contains the following: "The building described by said policy or containing said property was occupied in its several parts by the parties hereinafter named, and for the following purposes, to-wit." In the space immediately following the above is inserted in writing these words: "Used as a residence by Hill Adair up to 3:30 P. M. Sept. 20, 1890," and which is followed by the printed words "and for no other purpose whatever."

The judgment complained of is clearly right. Indeed, it is the only one possible upon the record before us, and the district court might with propriety have directed a verdict for the plaintiff at the conclusion of the trial. The statement quoted from the proof of loss, and which is relied upon for a reversal of the judgment, raises no presumption of a breach of the condition of the policy with respect to the occupancy of the building insured. The language therein employed obviously refers, not to the fact, but to the character of the occupancy, and by no reasonable construction can it be inferred therefrom that said building remained unoccupied after the removal of the particular tenant on September 20,—twelve days previous to the loss. The defense relied upon was an affirmative one, as to which the burden was upon the defendant company, and on account of the failure of proof to sustain the allegation of the answer, the judgment must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. S. H. KING ET AL.,
V. CHARLES L. HALL, JUDGE OF THE DISTRICT
COURT.

FILED, MARCH 18, 1896. No. 8338.

1. **Supreme Court: JURISDICTION.** The original jurisdiction of this court is by section 2, article 6, of the constitution, restricted to cases relating to the revenue, civil cases to which the state is a party, *mandamus*, *quo warranto*, and *habeas corpus*.
2. ———: ———. It is not within the power of the legislature to confer upon this court original jurisdiction over subjects not enumerated in the constitution. (*Miller v. Wheeler*, 33 Neb., 765.)
3. ———: ———: **PROHIBITION.** The constitution has not conferred upon this court original jurisdiction to award a writ of prohibition as an independent remedy.
4. ———: ———: ———. Whether a writ of prohibition may be allowed by this court in aid of its appellate jurisdiction, *quære*.

ORIGINAL application for a writ of prohibition forbidding the respondent from entertaining any proceeding or making any order in a certain cause pending in the district court for Lancaster county. *Dismissed*.

J. R. Webster, G. A. Adams, and Fred Shepherd,
for relators:

Prohibition is a remedy provided by the common law against encroachment of jurisdiction and is regarded as generally applicable unless abrogated by positive and express statutory enactment. (*Arnold v. Shields*, 5 Dana [Ky.], 18; *Mayo v. James*, 12 Gratt. [Va.], 18; *Thomson v. Tracy*, 60 N. Y., 31; *State v. Judge*, 38 La. Ann.,

247; *Hutton v. Fowke*, 1 Keb. [Eng.], 648; *North Bloomfield Gravel Mining Co. v. Keyser*, 58 Cal., 315.)

Like other common law remedies, prohibition is generally considered as pertaining to the jurisdiction of courts possessing common law powers, unless abolished by statute, as one of the means by which appellate courts exercise their jurisdiction. (2 Spelling, Extraordinary Relief, secs. 1719, 1733; *Connecticut R. R. Co. v. Commissioners of Franklin County*, 127 Mass., 58; High, Extraordinary Legal Remedies, secs. 762, 765, 767, 768; *Day v. City of Springfield*, 102 Mass., 312.)

So much of the common law of England as is applicable, and is not inconsistent with the federal or state constitution, or with any statute law of the state, is declared to be the law of this state. The supreme court has jurisdiction to issue the writ. (Compiled Statutes, ch. 15; State Constitution, art. 1, sec. 24, art. 6, secs. 1, 2; High, Extraordinary Legal Remedies, sec. 763.)

Charles L. Hall, pro se.

L. C. Burr and A. S. Tibbets, for receiver, John E. Hill.

Post, C. J.

A rule was, upon the sworn information of the relators, allowed against the respondent, one of the judges of the district court for Lancaster county, to show cause why a writ of prohibition should not issue from this court restraining him, the said respondent, from making certain orders in the case of *William G. Morrison v. Lincoln Savings Bank & Safe Deposit Company*, pending

in said district court. The ground of the application, briefly stated, is that the defendant is one of the subscribers for the original stock of said bank, which is now insolvent; that of the amount so subscribed there has been paid ten per cent and no more, leaving the respondent liable to the creditors of the bank for ninety per cent of his aforesaid subscription, by reason of which he is disqualified to act in said case or to make any orders therein affecting the rights of the creditors; but notwithstanding said fact, the respondent did, on the 12th day of January, 1896, while presiding over one of the divisions of the district court for said Lancaster county, assume to appoint one J. E. Hill, as receiver, to wind up the business and affairs of said bank; that a motion was subsequently made by the relators for the discharge of said receiver and for the appointment of a more suitable person to execute the said trust, and that the respondent, although disqualified to act in the premises by reason of the facts herein stated, is about to, and will, unless restrained by this court, pass upon and decide said motion, etc. The respondent, in obedience to the *nisi* order, has submitted a statement, under oath, denying *seriatim* the allegations of the information, and unites with the relator in affirming the jurisdiction of this court to entertain the proceeding, notwithstanding our intimation to the contrary. We appreciate the delicacy of the position in which Judge Hall is placed by this proceeding, and can but commend his course in insisting upon a determination of the merits of the controversy, although we must decline, for reasons hereafter stated, to entertain that question. Owing to the fact already appearing, that

the parties hereto agree in asserting the jurisdiction of this court over the subject of the controversy, we have been deprived of the assistance which would, under other circumstances, have been expected from counsel in the investigation of so important a subject. We have, however, devoted to an examination of that question the time at our disposal, and which has resulted in a conclusion adverse to the contention in favor of our jurisdiction.

The development of the remedy by means of the writ of prohibition in the court of queen's bench, and also in this country, is both entertaining and profitable as a field for study; but that subject is foreign to the present inquiry, since the question here involved is one of constitutional construction, and depends upon the interpretation given to the express provisions of that instrument. This court, except in the exercise of its appellate jurisdiction, is one of limited and enumerated powers. It shall have jurisdiction, says the constitution, "in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus, quo warranto, habeas corpus*, and such appellate jurisdiction as may be provided by law." (Constitution, art. 6, sec. 2.) That provision, it was held in *Miller v. Wheeler*, 33 Neb., 765, is a grant of power and by implication limits the original jurisdiction of this court to the subjects therein enumerated. The peculiar character of a constitutional tribunal is that it is not susceptible of change in any essential respect save in the manner prescribed in the fundamental law itself. That principle was early recognized by the supreme court of the United States in giving effect to the provision of the federal consti-

tution defining its original jurisdiction, viz., the supreme court shall have original jurisdiction "in all cases affecting ambassadors and other public ministers and consuls, and those in which a state shall be a party." (Constitution, U. S.; art. 3, sec. 2.) The question of the power of congress to confer upon that court jurisdiction in *mandamus* proceedings was presented in *Marbury v. Madison*, 1 Cranch [U. S.], 137, and resolved in the negative, Chief Justice Marshall using this forcible language: "If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance." The doctrine thus stated is supported by an unbroken line of decisions by that court, including the recent case of *California v. Southern Pacific Co.*, 157 U. S., 229. Other courts have gone still further in denying to the legislature power to enlarge their jurisdiction. For instance, in *Sevinsky v. Wagus*, 76 Md., 335, under a constitutional provision conferring upon the Maryland court of appeals jurisdiction "co-extensive with the limits of the state, and such as is now, or may

hereafter be, prescribed by law," that court refused to entertain an application for a writ of *habeas corpus*, although the legislature had expressly declared that "the court of appeals and the chief judge thereof, shall have power to grant the writ of *habeas corpus* and to exercise jurisdiction in all matters relating thereto throughout the whole state." In the opinion of the court, Alvey, C. J., after proving that the court of appeals had under the previous constitution appellate jurisdiction only, says: "It would therefore seem to be clear that the jurisdiction of this court is appellate only; for if not so, and the legislature could confer original jurisdiction upon it in cases of *habeas corpus*, it could also confer such jurisdiction in cases of *mandamus*, or in cases of any other subject-matter of original jurisdiction." But the precise question here involved was before the supreme court of Illinois in the recent case of *People v. Horton*, 12 National Corporation Rep., 7, under a constitution after which ours appears to have been modeled and which confers upon that court original jurisdiction "in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases." It was held, citing *Field v. People*, 2 Scam. [Ill.], 79, and *Campbell v. Campbell*, 22 Ill., 664, that the original jurisdiction of that court cannot be extended by implication, but is limited to the subjects specially enumerated in the constitution, and that it was accordingly without authority to allow the writ of prohibition. It was further held,—but as to which we express no opinion,—that that court is without authority to award the writ of prohibition even in an ancillary proceeding in aid of

Andres v. Kridler.

its appellate jurisdiction. (See, also, Hawes, Jurisdiction of Courts, sec. 39; Brown, Jurisdiction of Courts, sec. 14; Works, Courts and Their Jurisdiction, 428.) A consideration of the authorities cited can lead to a single conclusion, viz., that it is not within the constitutional power of this court to grant the relief sought. The rule should therefore be discharged.

RULE DISCHARGED.

PHILIP ANDRES ET AL. V. W. H. KRIDLER.

FILED MARCH 18, 1896. No. 6284.

1. **Bill of Exceptions: AUTHENTICATION.** The original bill of exceptions allowed by the district court or judge will not be examined by this court unless authenticated in the manner prescribed by statute.
2. **Review: EVIDENCE: BILL OF EXCEPTIONS.** Assignments of error relating to the sufficiency of the evidence and the rulings of the court in receiving and excluding evidence, will be disregarded in the absence of a bill of exceptions properly allowed and authenticated.
3. **Pleading: NAMES OF PARTIES.** Where the pleadings disclose a cause of action against a defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as *descriptio personæ*. (*Thomas v. Carson*, 46 Neb., 765.)

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

Charles W. Haller, for plaintiffs in error.

John P. Breen, contra.

47	565
49	585
50	18
50	166
51	618
51	725
51	727
52	187
52	285
52	724
47	585
57	194

Post, C. J.

The defendant in error, as plaintiff in the district court, recovered a judgment against the plaintiffs in error, defendants therein, upon an instrument of which the following is a copy:

“\$500. OMAHA, NEB., March 24, 1888.

“Ninety days after date we promise to pay to Dennis J. Keleher, or order, five hundred dollars, for value received, payable at the banking house of McCague Brothers, Omaha, Nebraska, with interest at the rate of ten per cent per annum until paid.

PHILIP ANDRES, *Pres.*

“J. W. McDONALD,

“J. H. STANDEVEN,

“THOMAS FALCONER,

“C. M. O'DONOVAN,

“DENNIS J. KELEHER,

“JOHN JENKINS,

“*Directors Omaha Truth P. & P. Company.*”

Separate answers were filed by the several defendants, in all of which it was in substance alleged that the instrument sued on was the note of the Omaha Truth Printing & Publishing Company, a corporation; that it was taken and accepted by Keleher, the payee therein named, with the distinct understanding and agreement that it was the obligation of the corporation named and not the contract of the individual signers, or any of them. It was further alleged that the plaintiff therein was not a *bona fide* holder of said note, and that he took it after maturity with notice of the defendants' rights in the premises. The plaintiff, in reply, denied the allegations of the answers, and charged that said note was executed by the

defendants as their personal obligation, and not in behalf of said corporation.

From the transcript of the judgment it appears that the cause was called for trial, having been reached in its order November 7, 1892, and there being no appearance for the defendants, a jury was waived by the plaintiff and a trial had to the court, with the result stated. The defendants, in due time, moved to set aside the judgment so rendered, and for a new trial, assigning therefor the following grounds:

"1. There was irregularity in the prevailing party, by which the above named five defendants were prevented from having a fair trial.

"2. There was misconduct of the prevailing party.

"3. Said five defendants and the attorneys of said five defendants were the victims of accident and surprise, which ordinary prudence could not have guarded against.

"4. There was error in the assessment of the amount of recovery.

"5. The decision is not sustained by sufficient evidence, and is contrary to law."

Said motion coming on for hearing at a later day of the term was by the court overruled, to which order exceptions were duly taken and the cause removed into this court for review. It appears from the transcript that evidence was submitted in support of the allegations made in the first, second, third, and fifth assignments of the motion for new trial. But the alleged bill of exceptions, although apparently allowed by the trial judge, is not authenticated in the manner required by statute to make it a record of this court. Indeed, there is no pretense whatever of an authen-

tication, and the assignments which depend upon a bill of exceptions must accordingly be disregarded. (*Flynn v. Jordan*, 17 Neb., 520; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397; *Oltmanns v. Findlay*, 47 Neb., 289, and cases cited.)

It is, however, contended that the petition failed to state a cause of action against the defendants therein named, for the reason that the instrument sued on is the contract of the corporation named and not of the individual signers. We held in *Thomas v. Carson*, 46 Neb., 765, that where a petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," should be rejected as *descriptio personæ*. (See, also, *Farrell v. Reed*, 46 Neb., 258.) The rule as there stated is sanctioned by the overwhelming weight of authority, and is without doubt applicable to the facts of the case at bar.

Our attention is also called to an error in the assessment of damage, whereby judgment was allowed for eighteen cents in excess of the amount actually due on the note. The amount named, although small, is not beneath the cognizance of the court, and the defendant in error will accordingly be required to remit the amount erroneously assessed in his favor; and upon the filing of such remittitur within twenty days the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

THEODORE GALLIGHER V. AARON WOLF ET AL.

47	589
56	361

FILED MARCH 18, 1896. No. 6316.

1. **Appeal Bonds: ADDITIONAL SECURITY: PRACTICE.** If, in an appeal to the district court from a judgment of a justice of the peace, the appeal bond is believed to be insufficient, it is proper for the appellee to file a motion asking the court to order a change or renewal of such undertaking.
2. ———: ———: ———: **DISMISSAL NISI.** In such a case, if the court is satisfied of the insufficiency of the appeal undertaking, it may make the order requested, and it is proper practice to fix the time within which such change or renewal shall be effected and to enter a dismissal of the action for a non-compliance with such order.
3. **Conflicting Evidence: REVIEW.** The finding of a trial court on conflicting testimony will not be disturbed on error or appeal, unless clearly and manifestly wrong.
4. **Order for Sufficient Appeal Bond: EVIDENCE.** The evidence examined, and *held* to sustain the findings of the trial court.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

David Van Etten, for plaintiff in error.

Smith & Sheean and *Will H. Thompson*, contra.

HARRISON, J.

In an action commenced and in which there was a trial and judgment for defendants in justice court in Douglas county there was an appeal taken by the unsuccessful party to the district court, and during the pendency thereof the defendants moved the court to require the appellant to furnish a further and sufficient appeal

undertaking, for the alleged reason that the surety who signed the bond on file in the case was insolvent and judgment on the bond would be uncollectible. This motion was filed March 28, 1892, soon after the appeal was docketed in the district court, and on June 4, following its filing, was sustained on the showing, as to the facts involved, made by the party in whose interest it was filed, the other party offering no evidence, in form of affidavits or otherwise, on the points raised by the motion, and the appellant was ordered to furnish new and sufficient appeal undertaking within fifteen days. This order was not complied with, and on July 7, 1892, the defendant moved the court to dismiss the appeal because of such non-compliance. On July 11 another motion was filed for defendant, similar in terms, and the purpose sought to be attained, with that filed July 7, four days prior. The motion to dismiss was presented to the court and, on hearing, was sustained and the case dismissed at the cost of plaintiff. On the last mentioned date there was a motion filed for plaintiff to vacate the order made June 4, by which plaintiff was required to furnish a new and sufficient appeal bond, the ground of the motion being that the surety who signed the original undertaking was responsible and had justified when he executed it, or before its approval. On the 19th day of July plaintiff moved the court to vacate the order of dismissal of the action for stated reasons: "(1.) Said decision is contrary to law. (2.) Said order was irregularly obtained, without the knowledge or consent of plaintiff and by misconduct of the prevailing party." This motion was supported by affidavits, the statements of which

tended to show the responsibility of the surety on the appeal undertaking, and what was claimed to be irregularity in obtaining the order dismissing the case. Contradictory affidavits were filed on behalf of defendants, and, on the hearing, plaintiff's motion to vacate the court's order dismissing the cause was overruled. To secure a reversal of this ruling is the purpose of these proceedings.

It is contended that there was not sufficient evidence to support the order of the court by which the plaintiff was required to file a new and sufficient appeal bond; and further, that, on the facts as shown by the parties, the action of the court in overruling the motion to vacate the order of dismissal was erroneous and clearly opposed to the weight of the evidence on such point. If the appeal undertaking was considered insufficient, it was proper for the appellee to file the motion asking the court to order its change or renewal (see sec. 1016, Code of Civil Procedure), and for the court, if satisfied of its insufficiency, to make the order requested; and it was proper practice, although there did not exist any statutory provision to such effect, to fix the time within which such change or renewal should be effected and also to enter a dismissal of the action for a non-compliance with its order in respect to the undertaking. (*Robare v. Kendall*, 22 Neb., 677.) We are satisfied from the record that the action of the court in ordering the renewal of the appeal undertaking was supported by sufficient evidence; and further, that, in respect to the alleged irregularities in obtaining the order dismissing the case, the evidence was conflicting, and the decision of the trial judge thereon entitled to

Omaha Real Estate & Trust Co. v. Kragscow.

stand, from which conclusions it follows that the judgment of the trial court must be

AFFIRMED.

66-658

OMAHA REAL ESTATE & TRUST COMPANY V.
JOSEPH S. KRAGSCOW.

OMAHA REAL ESTATE & TRUST COMPANY V.
SARAH J. SHAW ET AL.

OMAHA REAL ESTATE & TRUST COMPANY V.
JOHN W. RODEFER ET AL.

OMAHA REAL ESTATE & TRUST COMPANY V.
CHARLES E. REITER.

FILED MARCH 18, 1896. Nos. 6377, 6378, 6379, 6380.

1. **Ejectment: EVIDENCE.** A plaintiff, in an action of ejectment, must recover on the strength of his own title or right to the property and cannot rely upon the weakness or invalidity of the defendant's title or right.
2. ———: ———. The plaintiff, to recover in ejectment, must possess and prove a legal title.
3. **Conflicting Statutes: CONSTRUCTION.** Where there exist two statutes between which there is a direct and irreconcilable conflict, the later in point of time will be upheld and prevail.
4. ———: ———. Where there are two sections of a statute on the same general subject and enacted at the same time, and one section is afterwards amended so that it directly conflicts with the other, the amended section, being the latest expression of the law-maker on the subject, will prevail and the other be repealed by implication when not repealed in express terms.
5. ———: ———. Section 5 of an act entitled "Of real estate and the alienation thereof by deed," passed January 26, 1856 (Session Laws, p. 80, ch. 31), as amended February 13, 1864 (Session Laws, p. 58, ch. 12), was in direct and irreconcilable conflict with the provisions of section 44

47	592
50	529
52	728
54	450
47	592
56	605
57	5

of chapter 31 of the same statute, passed at the same time, and, consequently, operated its repeal by implication.

6. ———: ———. Where two sections or portions of the same statute, passed at the same time, are inconsistent with and repugnant to each other, so much so that both cannot be enforced, the last section, or last words, will be allowed to prevail and the section or words in conflict therewith held to be repealed.
7. ———: ———. Sections 5 and 41 of chapter 43, Revised Statutes of 1866, entitled "Real Estate," were enacted at the same time, as parts of the same statute, and being in some of their provisions so repugnant that both could not be executed, inasmuch as they conflicted, the last section—41—prevailed and the other was repealed.
8. **Evidence: DEEDS: NAMES.** The title to real estate appeared from the record to be in Joel S. Smith. A deed which purported to convey such real estate and which, in its recitals and also in the acknowledgment designated the grantor as "Joel S. Smith," but which was signed "John S. Smith," held not competent evidence to prove a conveyance of the title of Joel S. Smith in the absence of other proof establishing that the person who signed the deed, John S. Smith, and Joel S. Smith were one and the same person.
9. **Trial: RIGHT TO WITHDRAW REST: REVIEW.** The granting or overruling of an application by a party to a suit who has rested his case, to withdraw the rest and offer or introduce further testimony, is a matter within the discretion of the trial judge, and where such an application has been allowed for the purpose of affording a party an opportunity to offer or introduce testimony on certain subjects specified in the motion and allowance, and the party seeks to extend the privilege accorded, further so as to include other and entirely different subjects, it is within the discretion of the trial court to grant or refuse such extension, and unless an abuse of discretion appears in a refusal so to do, it will not be error or cause for a reversal of the judgment.
10. **Acknowledgments.** The rule announced in the first paragraph of the syllabus in the case of *Hoadley v. Stephens*, 4 Neb., 431, to the extent it relates to the acknowledgment of deeds in another state than this, before a commissioner of deeds for this state, overruled.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

The opinion contains a statement of the case.

George W. Covell, for plaintiff in error:

The provisions relating to the acknowledgment of deeds are made for the protection and security of creditors and purchasers, but so far as the grantor is concerned, the title vested in him passes by the deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded. (*Hastings v. Vaughn*, 5 Cal., 315; *Stewart v. Mathews*, 19 Fla., 752; *Gibbs v. Swift*, 12 Cush. [Mass.], 393; *Raines v. Walker*, 77 Va., 92; *Strong v. Smith*, 3 McLean [U. S.], 362; *Harrison v. McWhirter*, 12 Neb., 152; *Goodenough v. Warren*, 5 Sawyer [U. S.], 494; *Brown v. Manter*, 22 N. H., 468; *Stevenson v. Cloud*, 5 Blackf. [Ind.], 92; *Sicard v. Davis*, 6 Pet. [U. S.], 124; *Simpson v. Munde*, 3 Kan., 172; *Hill v. Samuel*, 31 Miss., 307; *McMahon v. McGraw*, 26 Wis., 614; *Jackson v. Allen*, 30 Ark., 110.)

The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee; and it is good as to all persons who are charged with such notice. The acknowledgment and recording of the deed are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed as to the grantor. (*Blain v. Stewart*, 2 Ia., 378; *Ricks v. Reed*, 19 Cal., 551; *Dole v. Thurlow*, 12 Met. [Mass.], 164; *Hepburn v. Dubois*, 12 Pet. [U. S.], 375; *Moore v. Thomas*, 1 Ore., 201; *Musgrove v. Bouser*, 5 Ore., 313.)

The certificate of acknowledgment is not essential to the validity of the deed, which is operative, without acknowledgment between the parties. The certificate is simply evidence of the execution of the deed supplying the place of direct proof, and, like all other evidence, should receive a reasonable construction. (*Gray v. Ulrich*, 8 Kan., 112; *Harrington v. Fish*, 10 Mich., 415.)

Where the acknowledgment of a deed is taken without the state by a commissioner of deeds appointed by the executive authority of such state, no proof of his authority other than authentication by his seal is required. (*Smith v. Van Gilder*, 26 Ark., 527; *Vance v. Schuyler*, 1 Gil. [Ill.], 160; *Thompson v. Schuyler*, 2 Gil. [Ill.], 271; *Irving v. Brownell*, 11 Ill., 402.)

A party interested in part of an entire tract may take the acknowledgment of a distinct interest in the same tract. (*Dussaume v. Burnett*, 5 Ia., 95.)

An officer related to one of the parties may take an acknowledgment, because the act is not judicial but ministerial. (*Lynch v. Livingston*, 6 N. Y., 422; *Kimball v. Johnson*, 14 Wis., 682*.)

The fact that an acknowledgment is taken by a party to the conveyance does not invalidate the deed. It is good between the parties and those who have actual notice of its existence. (*Beaman v. Whitney*, 20 Me., 413; *Hogans v. Carruth*, 18 Fla., 587; *Stevens v. Hampton*, 46 Mo., 404; *Caldwell v. Head*, 17 Mo., 561; *Cooley v. Rankin*, 11 Mo., 642; *Black v. Gregg*, 58 Mo., 565.)

The current of authority is to the effect that the taking of an acknowledgment is an act purely ministerial in its character, and not in any sense judicial. It involves no compulsion or summons

of any person who does not appear of his own accord, and rarely, if ever, requires an investigation of the circumstances under which the deed was executed. (*Learned v. Riley*, 14 Allen [Mass.], 109; *Odiorne v. Mason*, 9 N. H., 24; *Hill v. Bacon*, 43 Ill., 477; *Biscoe v. Byrd*, 15 Ark., 655; *Schultz v. Moore*, 1 McLean [U. S.], 520.)

A defective acknowledgment can be taken advantage of only by a purchaser for a valuable consideration. (*Bishop v. Schneider*, 46 Mo., 472; *Martin v. Halley*, 61 Mo., 196; *Choteau v. Burlands*, 20 Mo., 482.)

Reference was also made to the following cases: *Connell v. Galligher*, 36 Neb., 749; *Hoy v. Allen*, 27 Ia., 208; *Lake v. Gray*, 30 Ia., 415, 35 Ia., 459; *Doe v. Naylor*, 2 Blackf. [Ind.], 32; *Ricks v. Reed*, 19 Cal., 571.

Wharton & Baird and J. E. Nerin, contra:

One who was a member of the Omaha Real Estate & Trust Company, and therefore a party in interest, could not properly witness or acknowledge the mortgage. (*Wilson v. Traer*, 20 Ia., 233; *Child v. Baker*, 24 Neb., 188; *Winsted Savings Bank v. Spencer*, 26 Conn., 194; *Hammers v. Dole*, 61 Ill., 307; *West v. Krebaum*, 88 Ill., 263; *Doil v. Moore*, 51 Mo., 589; *Withers v. Baird*, 7 Watts [Pa.], 227; *Kimball v. Johnson*, 14 Wis., 734.)

Bartlett, Crane & Baldrige, also for defendants in error.

HARRISON, J.

October 3, 1891, an action of ejectment was commenced by the plaintiff against Joseph S. Kragscow in the district court of Douglas county the

property involved being described in the petition as follows: "Lots number thirty-nine (39) and number forty (40), in block number one (1), in Saunders & Heimbaugh's Addition to Walnut Hill, an addition to the city of Omaha." It was alleged that the defendant had, ever since the 23d day of December, 1890, unlawfully kept and was holding possession of the property, and keeping plaintiff out of possession thereof. It was also charged that defendant had received rents and profits of the premises to the amount of \$94. Plaintiff prayed judgment for the possession of the property and a recovery of the rents and profits. Defendant answered, admitting possession of the property and alleging affirmatively his lawful possession thereof since February 1, 1888, and denying the other allegations of the petition. To this there was a reply denying the allegations of the answer in regard to the lawful possession of the defendant. On the same date, October 3, 1891, three other cases of ejectment were instituted in the same court, one against Sarah M. Shaw and others, one against John W. Rodefer and others, and one against Chas. E. Reiter, each to recover possession of property situate in the addition hereinbefore stated; also to recover rents and profits of the premises involved in each case, alleged to have been received by the parties defendants. Issues were joined, and on March 27, 1893, the first mentioned case was called for trial, a jury was waived and trial had to the court. At the beginning of the trial the parties entered into the following agreement, which was made of record: "It is agreed by the parties to try this case, and that a finding shall be had by the court, and the other cases, being numbers 27—160,

27—161, 27—162, 27—163, shall abide the result of the finding in this case, except as to proof and finding and judgment as to rental values." The cases have, by stipulation, all been presented to this court together, there being a separate record and bill of exceptions in each case. The judgments in the district court were adverse to the plaintiff and reversals are sought here.

In the brief filed for plaintiff there is a statement of some facts which serves, and is almost necessary, as an introduction, in order to a proper understanding of the other and further facts and questions developed by the evidence as offered and introduced or rejected during the trial. We will, for this statement, quote from the brief: "Prior to the 1st day of August, 1886, the Omaha Real Estate & Trust Company purchased the tract of land on which Saunders & Himebaugh's Addition to Walnut Hill was, after said purchase, situated, and laid out and platted said addition upon said tract, and duly dedicated the same. On August 1, 1886, the said Omaha Real Estate & Trust Company sold and conveyed the premises in controversy in these actions, as well as a large number of other lots in said addition, to the Pleasant Hill Building Association, a corporation of Douglas county, Nebraska. On that day the Omaha Real Estate & Trust Company loaned to the Pleasant Hill Building Association sixteen thousand one hundred and seventy-five (\$16,175) dollars, and took the notes of said last named corporation therefor, bearing interest at eight and ten per cent, and, as security for the payment of said notes, received from said corporation a mortgage for said amount upon the property in controversy in these suits, as well as the other property

which was conveyed to said corporation by plaintiff August 1, 1886, which mortgage was, immediately upon delivery thereof, recorded. On or about March 22, 1890, an action to foreclose said mortgage was begun, which resulted in a decree of foreclosure against all of the real estate described in said mortgage and an order of sale thereof, directing J. F. Gardner, as special master commissioner, to sell the premises after appraising and advertising the same, who proceeded to appraise, advertise, and sell the same. At the said sale the Omaha Real Estate & Trust Company became the purchaser of all the lots described in the mortgage and the decree, which included the property in controversy in these suits in ejectment. The sale of these lots was confirmed by the court and deed ordered to be made to the purchaser, and on December 23, 1890, a deed was executed and delivered by said special master commissioner for the premises in controversy herein, and other property, to the Omaha Real Estate & Trust Company, which deed was on that day recorded." Counsel for plaintiff states that it was his understanding that plaintiff and defendants claimed that their rights to the properties arose from the same or a common source of title, the Pleasant Hill Building Association, and in accordance with this belief or understanding, he first introduced in evidence the mortgage foreclosure proceedings which were noticed in the preliminary statement of facts, also the deed of the special master commissioner, made to plaintiff pursuant to its purchase of the property at the foreclosure sale. A certified copy of the deed executed by plaintiff to the Pleasant Hill Building Association was offered on behalf of plaintiff, for

the purpose of showing that at the time of the foreclosure proceedings such association had the title to the property, and after introducing some evidence in regard to rental values of the premises in controversy the plaintiff rested his case, but the record shows that the rest was withdrawn and the plaintiff was allowed to introduce further testimony. We will now say that whenever hereafter reference is herein made to a deed, conveyance, or will, it will be one which purports to transfer or affect the premises in controversy. Counsel for plaintiff next offered as evidence a warranty deed from Alexander H. Baker and wife to Pierce C. Himebaugh and Nathan Merriam; then a deed from the last mentioned parties to the Omaha Real Estate & Trust Company, and next, a quitclaim deed from Alexander H. Baker to the same company. There was next introduced a plat of Saunders & Himebaugh's Addition to Walnut Hill and the record shows the taking of testimony closed. Then appears the following: "Plaintiff now asks to withdraw his rest and show source of title from the government of the United States to Alexander H. Baker. I desire also to show by extrinsic evidence, or by the original deed to the Pleasant Hill Building Association, executed by the Omaha Real Estate & Trust Company, that it was conveyed in the conveying clause to the Pleasant Hill Building Association; and I ask it on the ground of surprise, because, until today, it was never brought to my notice that there was any defect in the records of the grantee of the Omaha Real Estate & Trust Company,—that is, it was never brought to my notice that the grantee's name in the conveying clause was not the Pleasant Hill Building Association,—and I

offer to make this proof by the production of the original deed to the Pleasant Hill Building Association, the secretary of that association, I believe, being in town, and having in his possession the original deed. I don't include in the proposition an offer of the deed for the purpose of showing that the party who witnessed the deed was other or different than the one that has been shown to be a stockholder of the Omaha Real Estate & Trust Company."

The Court: "I will allow you to trace the title from the government down to Baker if you want to. I will allow you to introduce the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, if you can, but inasmuch as you say that in no manner you expect to prove the witnessing of the deeds is different from what has been shown."

Mr. Covell: "And further, if the original deed to the Pleasant Hill Building Association cannot be found, I ask to show by parol evidence, in consequence of ambiguity in the deed, that the deed was actually made to the Pleasant Hill Building Association, instead of to the Pleasant Hill Association, by reason of ambiguity in the deed."

The Court: "You can introduce what you stated—chain of title from the government down to A. H. Baker, and the original deed, if you can, for the purpose of showing whatever the deed may show."

There was then offered in evidence a certified copy of a patent from the United States to Samuel Conger, a certified copy of the record of a deed from Conger to Enos Lowe, and a certified copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce. To this last deed, when of-

ferred, a number of objections were interposed, among which was the following: "That the deed purports to be acknowledged before Thomas J. Ratham, a commissioner of deeds for Nebraska, for Pottawattamie county, Iowa; that the acknowledgment has not affixed or attached thereto the certificate of the secretary of state, as required by the laws in force at the time of the recording of the same, and was therefore not entitled to admission in the records." The objection was sustained and the deed excluded. There was next offered in evidence a deed by the sheriff of Douglas county to one Joel S. Smith, purporting to convey any title held by Roswell G. Pierce. This deed, on objection, was excluded. This was followed by an offer of a deed which, in its recitals, gave the name of the grantor as Joel S. Smith, the same name being stated in the acknowledgment, but the instrument was signed by John S. Smith. On objection, this deed was excluded. A number of other instruments were offered to complete the chain of title, including the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, also the original mortgage from the building association to the real estate and trust company, both of which were objected to on the ground that no title had been shown in the party grantor in either conveyance, and that the first offered deed was witnessed by a stockholder of the company, who was also its secretary, and purported to have been acknowledged before a person who was a shareholder in the grantor company; that the mortgage was attested by the secretary, also a stockholder of the association, the grantor, and its acknowledgment purported to have been

taken before a stockholder of the company, the mortgagee. The objections were sustained and both deed and mortgage were excluded from the evidence. The counsel for plaintiff at this time asked a witness he had called to the stand whether he was acquainted with defendant John S. Kragscow and the defendants in the other actions, and following his answer asked him: "You may state, if you know, under what claim of title the defendants in this action claim, if they make any claim of title." Immediately succeeding this in the record appears the following:

"Objection by defendant, first, as incompetent, irrelevant, and immaterial; second, for the reason that counsel for the plaintiff only asked permission of this court at the time these cases were being decided by his honor and at the close of his decision to simply make a record here showing title from the government down to Baker, and also asking the privilege to offer in evidence the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, and permission having been given by the court simply for those two purposes and no other."

The Court: "The court only gave permission that in these four cases, after having announced the opinion of the court against the plaintiff when the case was regularly reached on the 27th day of March, 1893, counsel for the plaintiff then requested that the plaintiff be permitted to introduce evidence of title from the government down to Baker and the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, that leave was granted after the judgment had been announced by the

court plaintiff in those four cases, and the court will not now permit evidence to be introduced other than as that requested by the counsel for plaintiff and sustains the objection going into the evidence sought by these interrogatories. Plaintiff excepts.

"Plaintiff offers to prove by this witness that the defendants in the several actions in which we are seeking to introduce testimony claim under the Pleasant Hill Building Association and to be in possession of the premises in controversy in this action under the Pleasant Hill Building Association by virtue of contracts of sale for the premises involved in this action executed to them by the Pleasant Hill Building Association; and this offer is made of proof by this witness because he knows the fact, having seen the contracts himself in the hands of the defendants to this action, whom he has stated that he knew."

The same objection was made to the offer as to the question, and this further: "And for the additional reason that the testimony offered is not the best evidence, the contracts themselves being the best evidence." The objections to question and offer were sustained.

Before proceeding with the examination and discussion of the alleged errors of the trial court, relied upon by counsel for plaintiff in the argument herein, it may be as well to state that defendants did not offer any proof of title, but rested their rights and relied upon possession of the premises. This, in actions of ejectment, they could do, as it is the rule therein that the plaintiff must recover upon the strength of his own title or right and cannot rely upon the weakness of that of his adversary the defendant. (*Gregory v. Ken-*

yon, 34 Neb., 640; *Franklin v. Kelley*, 2 Neb., 112; *Morton v. Green*, 2 Neb., 451; *O'Brien v. Gaslin*, 24 Neb., 561; *Buck v. Gage*, 27 Neb., 306.) If there is a common source of title, or the defendant claims under the same person as plaintiff, in proving title the plaintiff need go no further back than the common source (*Barton v. Erickson*, 14 Neb., 164; *Carson v. Dundas*, 39 Neb., 503); but where this is not the case, the plaintiff must show a grant from the state or United States and a regular and uninterrupted chain of title to himself, or, in other words, he must prove title. No doubt proof of title would be sufficient if possession necessary to establish title was shown either in plaintiff or those under whom he claims, but with this we have nothing to do in this case. It was not shown during the trial that plaintiff and defendants claimed under the same person or from common source of title; hence it devolved upon plaintiff to prove title in itself. In the attempt to do this, as we have before stated, as one link of the chain of title there was offered a certified copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce, which was objected to because it was acknowledged before a commissioner of deeds for Nebraska, in a county of the state of Iowa, and was not authenticated by the certificate of the secretary of state, which objection was sustained and the deed not allowed in evidence. This is one of the errors of which counsel for plaintiff complains, and for the strength of this complaint he relies upon matter contained in certain sections of the statute, viz., sections 4 and 5 of chapter 73, Compiled Statutes, which are in reference to the acknowledgment of deeds or instruments of conveyance and are as follows:

"Sec. 4. If executed and acknowledged or proved in any other state, territory, or district of the United States, it must be executed and acknowledged or proved either according to the laws of such state, territory, or district, or in accordance with the law of this state, and such acknowledgment shall be made before and certified by any officer authorized by the laws of such state, territory, or district to take and certify acknowledgments, or by a commissioner of deeds appointed by the governor of this state for that purpose.

"Sec. 5. In all cases provided for in section four of this chapter (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, notary public or other officer using an official seal) the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication; *Provided*, That in all other cases the deed or other instrument shall have attached thereto a certificate of the clerk of a court of record or other proper certifying officer of the county, district, or state within which the acknowledgment or proof was taken, under the seal of his office, showing that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer; that he believes the said signature of such officer to be genuine, and that the deed or other instrument is executed and acknowledged according to the laws of such state, district, or territory."

To which we will add the following from section 13 of the same chapter:

"Sec. 13. Every deed acknowledged or proved, and certified by any of the officers before named, including the certificate specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded," etc.

In support of the defendants' contention that the excluded conveyance was not authenticated as by law required, we are referred especially to section 36 of this same chapter, 73, which is as follows: "When any deed or other instrument shall be proved or acknowledged, or any oath or affirmation shall be taken before any commissioner appointed by virtue of this chapter, before it shall be entitled to be used, recorded, or read in evidence, in addition to the preceding requisites there shall be subjoined or affixed to the certificate signed and sealed by each commissioner as aforesaid a certificate under the hand and official seal of the secretary of Nebraska certifying that such commissioner was, at the time of taking such proof or acknowledgment, or of administering such oath or affirmation, duly authorized to take the same, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and has also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he verily believes the signature and the impression of the seal of the said certificate to be genuine."

The three or four preceding sections of the chapter are in reference to the appointment of

commissioners of deeds and in a general way defining their duties and powers. Section 36, quoted above, appears as section 44, chapter 31, entitled "Real Estate and the Alienation Thereof by Deed," approved January 26, 1856, also as section 41, chapter 43, Revised Statutes, 1866, under title "Real Estate," section 36, General Statutes, 1873, and section 4360, Cobbey's Annotated Statutes, 1893. This section was enacted in 1856 and was re-enacted February 15, 1864, in an act entitled "An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory," being section 42 of chapter 12 of the act. February 13, 1865, there was passed an act entitled "An act to amend chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory,' approved February 15, 1864" (Session Laws, 1865, p. 53), and which was as follows:

"Section 1. *Be it Enacted by the Council and House of Representatives of the Territory of Nebraska,* That section five of chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory' is hereby amended so as to read as follows, namely: In all cases provided for in section four of this act (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this territory for that purpose, notary public, or other officer using an official seal) the instrument thus acknowledged or proven shall be entitled to be recorded without further authentication. * * *

"Sec. 2. This act shall take effect and be in force from and after its passage.

"Approved February 13, 1865."

It is strenuously argued by counsel for plaintiff that the passage of this act operated a repeal by implication of the section now numbered 36, then numbered 42 of chapter 12, which required the certificate of the secretary of state to be attached to the acknowledgment of a deed taken before a commissioner of deeds. It is clear that there was an irreconcilable conflict between section 42 of chapter 12 and section 5 as amended by the later act, that they could not both stand and be enforced, for, if a deed was executed and acknowledged before a commissioner of deeds and presented for record without the certificate of the secretary of state, it would be sufficiently authenticated under the provisions of section 5 as amended, but its record necessarily denied if the provisions of section 42 (now 36) were enforced, and the last act, or the amended section 5 prevailed, and the other section was repealed by implication. (*State v. Howe*, 28 Neb., 618.) Sections 4 and 5, as enacted January 26, 1856, were as follows:

"Sec. 4. If acknowledged or proved in any other state or territory or district of the United States, it must be done according to the laws of such state, territory, or district, and must be acknowledged or proved before any officer authorized to do so by the laws of such state, territory, or district, or before a commissioner appointed by the governor of this territory for that purpose.

"Sec. 5. In cases provided for in the last section, unless when taken before such commissioner, the deed shall have attached thereto a

certificate of the clerk or other proper certifying officer of a court of record of the county or district within which it was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment or proof was, at the date thereof, such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer, and that he believes the signature of such officer to be genuine, and that the deed is executed and acknowledged, or proved according to the laws of such state or territory." (Session Laws, 1856, p. 80, ch. 31, secs. 4, 5.)

Section 4 was again enacted in the same terms, February 15, 1864. Section 5 was at the same date again enacted with the following changes: "In place of the words 'unless when taken' the words 'except where such acknowledgment is taken' were used, and also the words 'or state' were inserted after the word 'district,' and the words 'within which the acknowledgment was taken' were substituted for the words 'within which it was taken.'" Section 4 was again enacted unchanged February 12, 1866, and section 5, as amended February 13, 1865 (the amendment we have hereinbefore noticed), was also again enacted February 12, 1866, but the section in regard to the authentication of a conveyance acknowledged before a commissioner of deeds by the certificate of the secretary of state also appeared in the Revised Statutes of 1866 as section 41 of chapter 43 thereof. The sections 4 and 5 hereinbefore referred to were, by such numbers, sections of this same chapter, and there was the same conflict between the provisions of section 41 and section 5 as had existed as they appeared

as numbered in prior enactments, subsequent to the amendment of section 5, February 13, 1865, as hereinbefore noticed. It was said in an opinion in *Albertson v. State*, 9 Neb., 429, in which this court considered the question of a conflict between different parts of sections of the Revised Statutes of 1866: "The Revised Statutes of 1866 were passed as one act, and in such case the well-known rule applies that where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict therewith are, so far as there is a conflict, repealed;" and it was held: "Where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand and those in conflict therewith are repealed." Applying this rule in the case at bar, the section now numbered 36 must stand and so much of section 5 as is in conflict therewith must be held to be repealed, or without force.

It is further insisted in this connection by counsel for plaintiff that by the second section of an act passed June 13, 1867, to amend section 38 of chapter 43 of Revised Statutes of 1866, entitled "Real Estate," now section 33, chapter 73, Compiled Statutes, and a part of section 4357 of Cobby's Annotated Statutes of 1893, which reads as follows:—"All acts performed in pursuance of the laws of this state or of the laws of the territory of Nebraska, by commissioners of deeds heretofore appointed by the governor of the territory of Nebraska shall be deemed and held to be valid and binding in law" (Session Laws, 1867, special session, p. 52, sec. 2),—has made binding and legalized all deeds acknowledged before commis-

sioners of deeds prior to its passage, and the deed from Lowe to Pierce, being one of such, was thus relieved of any defect which may have existed; and further, that section 4 of chapter 61 of an act passed in 1887, which section is now section 4a of chapter 73 of the Compiled Statutes and section 4328 of Cobbey's Annotated Statutes of 1893, and which reads as follows:—"All deeds heretofore executed and acknowledged in accordance with the provisions of this act shall be and are hereby declared to be legal and valid,"—was effectual in curing any defect which may have existed in the authentication of the deed from Lowe to Pierce. These two sections, when examined, and the first in connection with the provisions of the section of which it was enacted as amendatory, it is plain have no reference to the authentication of the acts or deeds mentioned in them and were not passed with the purpose in view of relieving acts performed or deeds acknowledged before commissioners of deeds, of any defects in their authentication and did not do so for the deed in question. The deed served no doubt to pass the title to the land from the grantor to the grantee. This it would do without an acknowledgment or authentication; but lacking the certificate of the secretary of state, it was not entitled to be used, recorded, or read in evidence, and if recorded, a certified copy of it as so recorded could not properly be received in evidence, and the trial court did not err in rejecting it when offered.

In the case of *Hoadley v. Stephens*, 4 Neb., 431, in which the question of whether a deed executed in Virginia and acknowledged before a justice of the peace there would be received in evidence in

the courts of this state without further authentication or any proof that it was executed and acknowledged according to the laws of Virginia, sections 4 and 5 of the statutes as hereinbefore quoted, were referred to and their provisions applied, and it was held: "Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal, showing that the person taking such acknowledgment was the officer therein represented; that he is well acquainted with his handwriting; that he believes his signature to be genuine, and that such deed is executed according to the laws of such state." Whether the provisions of section 36 (as it was then) of the General Statutes, requiring the certificate of the secretary of state to be attached to a deed acknowledged before a commissioner of deeds, was considered we cannot say. No reference to or mention of it was made in the opinion. It follows from the views herein expressed that so much of the rule announced in the case alluded to as affected acknowledgments taken before commissioners of deeds must be overruled.

A certified copy of the record of a deed executed by the sheriff of Douglas county, purporting to convey the title of Roswell G. Pierce to Joel S. Smith, was offered, and immediately following this a certified copy of a deed which recited that the grantor's name was Joel S. Smith,

and by the acknowledgment he was stated to be Joel S. Smith, but the deed was executed by John S. Smith. This offered testimony was objected to and the objection sustained, and, we think, correctly. It was clearly not competent to prove a conveyance of any title of Joel S. Smith by a deed signed by John S. Smith. They would not be presumed to be the same persons. Conceding for the purpose of argument that the title was in Joel S. Smith, conveyance of the title from him to a grantee could not be proved by a deed executed by John S. Smith in the absence of proof that he was the same person as Joel S. Smith. (*Amb's v. Chicago, St. P., M. & O. R. Co.*, 46 N. W. Rep. [Minn.], 321, and cases cited.) There was offered by plaintiff in connection with the certified copy of the record of this deed a certified copy of the record of an affidavit, in which it was sought, by statements therein made, to show that the deed was that of Joel S. Smith and had been executed by him and not John S. Smith, but on objection this was excluded. In this action, we think, there was no error. It was the record of an *ex parte* affidavit and was plainly not competent as evidence on the trial of a cause of this nature.

The determination of the further question of the competency as evidence of the deeds attested by a stockholder of the grantor or grantee, and acknowledged before a stockholder, is not necessary to a decision of the case and we need not now discuss or settle it. If it was error to exclude the deed, it was error without prejudice, as the proof of the chain of title was broken and incomplete before these deeds were reached.

There is one further matter of complaint urged in behalf of plaintiff, viz., that the trial court

erred in not allowing the proof offered to show that the defendants were in possession of and claiming a right to the premises involved in the action, under and by virtue of contracts of purchase with the same person or company under whom the plaintiff claimed title, or that the source of title was a common one. It will be remembered that the case had been tried on the theory, as stated by counsel for plaintiff, that the parties to the action were claiming under a common source of title, and had been submitted to the court and a decision had been announced on the conditions as established by the circumstances and facts then in evidence and before the court, and on motion of plaintiff the case had been reopened for the hearing of further testimony on particular subjects specifically named, to prove a chain of title from the United States, and to offer the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association. Full opportunity was afforded for the introduction of the matters requested, and at the close of the hearing thus accorded the offer was made of testimony in regard to the contracts of purchase. The opening of a case after the parties thereto have announced the closing of offers of testimony, at the instance or request of either, for the offer or introduction of further evidence, is a matter which rests wholly within the discretion of the trial judge; but it should be given a wide range and liberally exercised in cases where such action will subserve the due administration of justice between litigants, always with a proper regard, however, to the observance and enforcement of settled rules and laws of procedure and an orderly course of

business. In full view of what had transpired during the trial of this case and the stage of the proceedings at which the action of the court against which this complaint is directed occurred, we cannot say that there was any abuse of its discretion in such action calling for a reversal of the judgments. The judgments of the trial court must be

AFFIRMED.

W. D. MATHEWS ET AL. V. SARAH M. JONES.

FILED MARCH 18, 1896. No. 6305.

1. **Merger of Estates.** Whenever a person acquires a greater and a lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate but is destroyed by or is considered in law as merged in the greater, but when, in such a case, an intention that the estates remain separate and distinct is expressed or may be implied or inferred, no merger can ensue but the intention will prevail.
2. **Mortgages: COLLATERAL NOTES: DEEDS: MERGER.** A mortgagee acquired the title to the mortgaged property, and in the deed by which it was conveyed to him it was stated that the title was passed "subject to a mortgage of three hundred dollars which grantee hereby assumes and agrees to pay." *Held*, That it was evident from this that the intention was to continue the life of the lien of the mortgage and no merger ensued as between the parties, or against a *bona fide* purchaser of the notes secured by the mortgage, and the deed, if recorded, was notice of the fact of such intention to parties who subsequently purchased the premises, and also afforded such notice to parties to whom it was so exhibited as to bring to their knowledge the existence of the clause in the deed, and who afterwards bought the property.
3. **Vendor and Vendee: MORTGAGES: RELEASE: BONA FIDE PURCHASERS OF NOTES.** Where parties before buying real

47	616
48	648
47	616
52	403
d54	718
d54	722
55	12
47	616
58	617
47	616
59	189

Mathews v. Jones.

estate examine the records and find the property to be encumbered by a mortgage, and apply to the mortgagee for information and are by him told that he has received a conveyance of the title, and a deed from the mortgagor to the mortgagee conveying the property is exhibited to them, and such deed contains a clause by which the grantee assumes and agrees to pay the indebtedness secured by the mortgage, and they subsequently buy the property at a time when, to their knowledge, the mortgage debt had not matured, they are chargeable with such notice as required them to make further inquiry and are not innocent purchasers, and a *bona fide* purchaser of the mortgage notes, at a date prior to the time of the purchase of the property by such parties, may enforce the mortgage as against their rights, and this, notwithstanding at the time they purchased the premises the mortgagee released the lien of the mortgage of record.

ERROR from the district court of Dodge county.
Tried below before MARSHALL, J.

H. M. Uttley, for plaintiffs in error.

Loomis & Abbott, contra.

HARRISON, J.

It appears from the pleadings and evidence in this case that lot 3, in block 17, Nye-Hawthorne Addition to the city of Fremont, was conveyed by C. H. Toncray to R. H. Taylor by warranty deed, the deed, according to its recitations, being executed October, 1888. Neither the statement in regard to time of the signature nor acknowledgment named the day of the month of October on which the act was done. The consideration expressed in the deed was \$600. On October 1, 1888, a promissory note in the sum of \$300, due October 1, 1891, also notes evidencing the amounts of semi-annual interest to be paid on the sum stated in the principal note, from its date until maturity, were

executed and delivered by R. H. Taylor to Toncray, and these notes, all secured by a mortgage on the lot hereinbefore described, conveyed by Toncray to Taylor. The mortgage was signed by Taylor and wife, of date October 1, 1888, and acknowledged October 12, 1888. Both deed and mortgage were filed for record October 18, 1888. Of date October 5, 1888, a warranty deed for the same premises was executed and acknowledged by Taylor and wife and delivered to Toncray. This deed was not placed on the record until August 27, 1890. At some time during the month of June, 1890,—the exact date does not appear,—one W. D. Mathews purchased, or bargained with Toncray for, the property, and on August 27, 1890, was given a deed for it, which was recorded on the same day. On the day prior, August 26, 1890, Mathews and wife had made and delivered a deed conveying the premises to Charles A. Manville, which was filed for record August 27, 1890, and on this same day Toncray released by entry on the margin of the record the mortgage which he had received from Taylor. Long prior to this time, or in October, 1888,—the date was not definitely shown,—Toncray had assigned the notes secured by the mortgage to the defendant in error herein. There was a failure to pay the principal note and some of the interest notes, and defendant in error instituted this action to enforce collection by foreclosure of the mortgage, and seeking a reversal of the decree in her favor rendered in the district court, the case was brought to this court by error proceedings.

The plaintiffs in error admitted in the district court, both in pleading and as a matter of evidence, the execution and existence of the mort-

gage in suit, and the notes secured thereby; denied the transfer of the notes to defendant in error, or sufficiently so to demand proof thereof, and Mathews asserted that in June, 1890, when he was bargaining with Toncray, having in view the purchase of the lot, he examined the records of Dodge county, the county wherein the real estate was situate, and discovered the title, as shown by the record, to be in R. H. Taylor, incumbered by the mortgage in suit, and, upon inquiry made to Toncray in regard to it, was by him shown the deed from the Taylors to Toncray, and was informed by Toncray that its not having been recorded was because of neglect, inattention, or forgetfulness on his part, that he would have it made of record at any time desired, and would also execute a release of the mortgage. Manville, who claims to have purchased of Matthews, also pleads that he examined the records in reference to this property August 26, 1890, the date of his purchase, or of the deed by which the property was conveyed to him; that the record disclosed the title to be in Taylor, incumbered by the mortgage to Toncray; that he applied to Toncray for further information, and was shown the conveyance from Taylor to Toncray, and was told that because of neglect on Toncray's part it had not been presented for record and that he would attend to it any time, and would also discharge the mortgage of record. Each of plaintiffs in error claims to have placed reliance, in purchasing the lot, upon the record, combined with the examination of the deed exhibited by Toncray and his statements and agreements, and the subsequent recording of the deed and release of the mortgage and the apparent condition of its title

as so shown and established; and further, being without any knowledge or notice of the transfer of the notes secured by the mortgage to defendant in error, and her consequent ownership of the lien, that they were innocent purchasers and are entitled to protection as such; that as against them and their rights the lien should not and will not be enforced; that conceding to defendant in error the purchase, in good faith, of the notes, and her resulting ownership of the mortgage and right to its due enforcement, yet, as she failed to take an assignment of it in writing and to have the same recorded, she put it in the power of Toncray, the mortgagee, to harm or wrong plaintiffs in error, and the mortgage must be held to be of no force as against the rights they acquired by the conveyance to them respectively. They further assert that when Toncray received from Taylor and wife a deed conveying to him the title to the lot there was vested in him both title and lien, they were united in one party, or there was a merger and the mortgage lien was discharged or extinguished. The plaintiffs in error agree in the statement that when the deed from Taylor to Toncray was made it contained the following recital: "Subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay," and that they noticed it when the deed was exhibited to them by Toncray. It must further be borne in mind that the transactions by which Mathews and finally Manville became owners of the lot were of time several months prior to the maturity of the principal note secured by the mortgage.

It is argued in the briefs filed for plaintiff in error that the deed from Taylor to Toncray, being executed on October 5, 1888, and the mortgage,

although dated and presumably signed on October 1, 1888, was not acknowledged until October 12, 1888, could not have been delivered to take effect until after its acknowledgment, and consequently the title was not in Taylor when he executed the mortgage, but had been conveyed to Toncray, hence the mortgage could not and never did have any real existence. It must be remembered that Toncray conveyed this lot to Taylor and that the consideration expressed in such conveyance was \$600. This deed was made in October, 1888, and it and the mortgage in suit were both filed for record on the same day, October 18, 1888. The mortgage was for \$300, the one-half of the apparent purchase price of the property. From these facts it is quite evident that the mortgage was given to secure a portion of the purchase price of the lot, the conveyance by Toncray to Taylor and mortgage from Taylor to Toncray were but parts of the one transaction and the mortgage intended to create a lien on the property, and that by it the intention was fully met and accomplished. The plaintiffs in error, and each of them, scanned the record before purchasing and by it were informed of the existence of this mortgage as a subsisting lien on the premises, and when Toncray exhibited to them the deed to him from Taylor, of date October 5, 1888, they obtained the information that the mortgage was a lien on the lot; that Toncray, the immediate source of the title to Mathews, recognized it as such, and not only this, but he assumed and agreed to pay it. Surely they are in no position to ask, nor is there any valid reason to be urged in their behalf, to induce us to alter the relations and conditions established by these different conveyances as in-

tended and recognized by the original parties to them; further on this point, during the trial it was admitted as evidential matter, as follows: "It is admitted by all the parties appearing to this suit that at the time R. H. Taylor and wife made the notes and mortgage set out in plaintiff's petition, that the said R. H. Taylor was the owner in fee-simple of the real estate described in the said mortgage." This, it seems, must have been meant to apply to, and put at rest, the subject or question of the apparent conflict in this particular, disclosed by an inspection of the dates of the several conveyances executed by the parties and involved by this question.

It is contended that when Toncray, the mortgagee, received the title to the lot by conveyance from Taylor, all the interests vested in him and were united; that there was a merger and it operated an extinguishment of the lien of the mortgage. On the subject of merger, in the opinion in the case of *Miller v. Finn*, 1 Neb., 254, written by MASON, C. J., it was said: "It is said the general rule is that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sank or drowned in the greater. (*James v. Morey*, 2 Cow., 284; 2 Blackstone, Com., 177.) * * * In Co. Litt., 388, it is said: 'Mergers were not favored in courts of law and still less in courts of equity.' They are never allowed unless for special reasons, and then only to preserve the intention of the parties. (*Phillips v. Phillips*, 1 P. Wm., 41.) When there is a union of rights, equity will preserve them distinct if the intention so to do is either express or implied;"

and it was held: "There can be no merger when the intention to keep the estates distinct may be inferred or has been expressed." (See, also, *Ætna Life Ins. Co. v. Corn*, 89 Ill., 170; *Shaver v. Williams*, 87 Ill., 469; *Richardson v. Hockenhull*, 85 Ill., 124; *Worcester Nat. Bank v. Cheeney*, 87 Ill., 602.) In the case at bar the mortgagee transferred the notes to the defendant in error and the ownership of the mortgage followed them, and in the deed from Taylor to Toncray, by which the latter took the title, the existence of the mortgage as an incumbrance on the title was set forth and he assumed and agreed to pay it. We think the intention that no merger or extinguishment of the mortgage lien was to be effected clearly appeared, or was to be inferred, and sufficiently so to charge the purchaser cognizant of the facts, as were the plaintiffs in error, with knowledge or notice of it. (*Ætna Life Ins. Co. v. Corn*, 89 Ill., 170; 1 Jones, Mortgages, secs. 870, 872.)

It is strenuously insisted that it was negligence on the part of defendant in error not to obtain a written assignment and have it recorded; that lack of such action placed in the hands of Toncray the power, by releasing the mortgage of record, to commit a fraud, and that it calls for the application of the rule that where one of two innocent parties must suffer loss, it must be borne by the one who, by negligence, placed it in the power of another to perpetrate the fraud, and that, under its application to the facts as developed in this case and its enforcement, defendant in error must bear the loss and should not have been granted a decree of foreclosure. This view is as earnestly combated in argument by counsel for defendant in error. The direct and main question involved

was discussed in an opinion written by NORVAL, C. J., in the case of *Whipple v. Fowler*, 41 Neb., 675, and it was held: "A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith or *bona fide* purchaser of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized, but as to all other persons the lien of the mortgage will not be impaired;" but, as we view the facts and circumstances of the case at bar, a discussion or re-examination of this subject, even if it was deemed best to be made, is not necessary to a determination of the question, which we think a controlling one in this branch of the case, in respect to the relative rights of the parties. This is, were Mathews and Manville *bona fide* purchasers of the property? If they were, then the other and further question which counsel have argued would arise and call for an answer. If not, it is not necessarily involved, or to be decided. They examined the record, and it disclosed the incumbrance or mortgage in suit, in favor of Toncray. On application to the mortgagee they were shown a deed from the mortgagor to him, unrecorded, which contained a statement that the title was conveyed to him subject to the incumbrance, and also that he assumed and agreed to pay it, and further, at the time these matters occurred and the property was conveyed to them respectively, the principal note secured by the incumbrance was not due. It was more than a year before its maturity. A knowledge of these facts was suffi-

White v. Smith.

cient to make it their duty, before purchasing, to ascertain the whereabouts and ownership of the notes and mortgage, to put them upon inquiry, and, having such notice and failing in the ensuing duty, they cannot now claim and be accorded the privileges and rights of *bona fide* purchasers. (*Purdy v. Huntington*, 42 N. Y., 334.) It follows that the judgment of the district court must be

AFFIRMED.

47	625
54	633

WIN S. WHITE, APPELLEE, V. NANNIE SMITH ET AL., MORTGAGORS, AND W. A. POLLOCK, INTERVENOR, APPELLANT.

FILED MARCH 18, 1896. No. 6178.

Review: BILL OF EXCEPTIONS. A decree of the district court cannot be reviewed upon a question of fact, when the evidence has not been preserved by a bill of exceptions duly settled and allowed.

APPEAL from the district court of Cedar county.
Heard below before NORRIS, J.

Addison M. Gooding, for appellant.

W. E. Gantt, contra.

NORVAL, J.

Win S. White brought suit in the court below to foreclose a real estate mortgage executed by Nannie Smith and Levi Smith. Subsequently Pollock filed a petition of intervention, but no copy thereof is to be found in the record. A decree of foreclosure was entered, and leave given

plaintiff to answer the petition of the intervenor, which answer was duly filed. In the meantime the property was sold under the decree to the plaintiff, the sale was confirmed, and a sheriff's deed was issued to him. Subsequently, but at what time, or what term of court, the record does not show, the cause was heard upon the petition of the intervenor Pollock, the answer thereto of White and the evidence, and a decree was entered in favor of the latter cancelling a quitclaim deed from J. L. Krosen and wife to Pollock, under which conveyance the latter claimed title to the property described in the mortgage, and quieting the title in the plaintiff. From the last decree Pollock appeals, claiming that the findings are contrary to the evidence.

The condition of the record is such that we are unable to review the findings and decree. The testimony was not preserved by a bill of exceptions. There is attached to the transcript a draft of a proposed bill, but it was never allowed by either the trial judge or the clerk of the district court, and plaintiff now protests against its being considered. The proposed bill was returned by plaintiff to intervenor with objections to its allowance, and no steps were taken to secure its settlement, so far as this record discloses. There is, however, attached to said draft of the bill of exceptions the following certificate:

"STATE OF NEBRASKA, }
CEDAR COUNTY. } ss.

"I, Jno. J. Goebel, clerk of the district court in and for Cedar county, hereby certify that the foregoing is a true and complete transcript of all papers and proofs received or known to me as such clerk in this case.

JNO. J. GOEBEL,

"Clerk Dist. Court."

Anheuser-Busch Brewing Association v. Murray.

This did not constitute a settlement or allowance of the bill. Moreover, the clerk had no power to settle a bill of exceptions in this case, inasmuch as he had not been authorized or empowered to do so by a written stipulation of the parties or their attorneys. As the testimony has not been made a part of the record by a bill of exceptions duly allowed, the decree must be

AFFIRMED.

ANHEUSER-BUSCH BREWING ASSOCIATION V.
ALEXANDER H. MURRAY.

47	627
58	413

FILED MARCH 18, 1896. No. 6259.

1. **Agency: EVIDENCE.** Agency cannot be proved by the mere declarations of one assuming to act in that capacity.
2. **Review: FINDINGS: PRACTICE.** The finding of a jury will be set aside where there is not sufficient evidence to support it.

ERROR from the district court of Adams county.
Tried below before BEALL, J.

Capps & Stevens, for plaintiff in error.

C. H. Tanner, contra.

NORVAL, J.

Alexander H. Murray brought suit in the court below against the Anheuser-Busch Brewing Association, alleging in the petition, substantially, that the defendant on the 1st day of January, 1891, contracted with him to manufacture for it

175 tons of ice at eighty-five cents per ton, if taken at the place of manufacture, or \$1.15 per ton if delivered by plaintiff at the vaults, vats, and beer cooling-house of the defendant in the city of Hastings; that in pursuance of said contract plaintiff manufactured said quantity of ice for the defendant and tendered the same to it, both at the place of manufacture and at the other point designated in the contract; that defendant refused to receive any of said ice, or pay plaintiff for its manufacture, and that there is due from defendant \$148.75 and interest at seven per cent from February 15, 1891, for which sum, with interest, judgment is demanded. The answer puts in issue the averments of the petition. Upon the trial to a jury, a verdict was returned for the plaintiff for \$127.50, and judgment was entered thereon. The defendant has prosecuted a petition in error to this court.

We will notice but one of the forty-two assignments of error, and that is that the trial court erred in holding there was evidence upon which to found a liability against this plaintiff. The record discloses that the defendant is engaged in the manufacture of beer at St. Louis, Missouri, and that one J. K. Ellis is a wholesale dealer in the city of Hastings in keg and bottle beer of defendant's manufacture. In January, 1891, Murray, being the owner or manager of a natatorium in the city of Hastings which contained a large pool or artificial lake, capable of collecting and holding water in a body until frozen into ice, entered into a verbal contract with Ellis to put up 175 tons of ice upon the terms stated in the petition. The pool or lake was thereupon filled by Murray with water, which after the mercury had

fallen low enough, formed into ice about twelve inches thick, and sufficient in quantity to meet the requirements of said contract. Ellis refused to receive or accept the ice when tendered. The defendant below insists that Ellis was not authorized to, nor did he represent it in the making of the contract in question. Upon a careful reading of the evidence we are satisfied that it fails to show that Ellis was the agent of the defendant for any purpose whatever. He handled its beer, it is true, but not under a contract of agency. Ellis purchased the beer of the manufacturer in St. Louis in car load lots on thirty days' time and shipped the same to Hastings, where he sold it to retail dealers on his own account, and alone reaped whatever profits there were derived therefrom. Ellis, in handling the beer, used the defendant's cooling-house, vaults, and vats in the city of Hastings, but the defendant was not to, nor did it, furnish the ice used in storing, preserving, and cooling the beer bought by Ellis. The latter alone contracted for and procured the ice on his own account. The only evidence tending to establish the relation of principal and agent between the defendant and Ellis are certain alleged declarations of the latter, and the fact that he procured to be printed on the defendant's wagon used by him in his business, "J. K. Ellis, Agent." It is not shown that any officer or representative of the defendant had any knowledge that the foregoing sign was upon the wagon. Agency cannot be established by the mere declarations of the alleged agent. (*Nostrum v. Halliday*, 39 Neb., 828; *Burke v. Frye*, 44 Neb., 223; *Richardson & Boynton Co. v. School District*, 45 Neb., 777.) There is an entire failure of proof to show that

 Rosewater v. State.

Ellis was the agent of defendant or possessed authority to bind it in the transaction. Whether the alleged contract is within the statute of frauds, and therefore void, because not in writing, it is unnecessary to determine. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

RYAN, C., not sitting.

EDWARD ROSEWATER V. STATE OF NEBRASKA.

47	630
60	148

FILED MARCH 18, 1896. No. 6898.

1. Contempt: PUBLICATIONS. To constitute any publication contemptuous it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt, or embarrass the due administration of justice. *Percival v. State*, 45 Neb., 741, followed.
2. ———: ———. Where a newspaper article is not *per se* contemptuous, or where it is susceptible of more than one reasonable construction, one of which is innocent and requires an innuendo to apply its meaning to the court, and the record fails to disclose that the language was employed in its culpable sense, the publisher is not liable for contempt. (*Hawes v. State*, 46 Neb., 149.)

ERROR to the district court for Douglas county.
Tried below before SCOTT, J.

Edward W. Simeral, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state:

The editor-in-chief of a newspaper is liable as

for contempt for articles which appear in the columns of his paper, though it is affirmatively shown that he had no knowledge of the articles until after publication. (*People v. Wilson*, 64 Ill., 195; *State v. Freer*, 24 W. Va., 416; *Commonwealth v. Morgan*, 107 Mass., 199; *People v. Stapleton*, 33 Pac. Rep. [Colo.], 167; *Rex v. Gutch*, M. & M. [Eng.], 433; *Commonwealth v. Nichols*, 10 Met. [Mass.], 259; *Smith v. Utley*, 65 N. W. Rep. [Wis.], 744.)

NORVAL, J.

Edward Rosewater was adjudged, by the district court of Douglas county, guilty of having committed a contempt of that court, and sentenced to pay a fine of \$500 and to imprisonment in the county jail for the period of thirty days. The defendant is charged with the publication in the *Omaha Bee* of the following portion of an article which appeared therein, to-wit:

"JUSTICE WITHOUT EQUALITY.

Sentences Adjusted to Fit the Men.

**One Party to a Crime Gets a Five-year Sentence
in the Penitentiary, While Another
Gets the Benefit of a Pull.**

"Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth."

The charge is founded upon the same fragment, or portion, of the newspaper article upon which the contempt proceedings were based in the case of *Percival v. State*, 45 Neb., 741. The only sub-

stantial difference between the information or affidavits filed by the county attorney in the two cases, is that in the reported case it was averred that Percival wrote and caused to be published the article in question, while in the one at bar it is alleged that Mr. Rosewater, as editor, proprietor, and manager of the *Omaha Bee*, "published and caused to be published and permitted to be published" the aforesaid article in the evening addition of said newspaper. The record discloses that no part of the article of which complaint is made was written by Mr. Rosewater; that he had no knowledge of its existence until after it was published; and that he did not directly or indirectly order or cause it to be inserted. It is also established that the *Omaha Bee* is published by the Bee Publishing Company, a corporation; that the defendant is, and was, one of the stockholders therein and the editor-in-chief of said newspaper, and as such had the general management and control of the policy of the paper and the different editions thereof, at the time the alleged contemptuous article was published.

The attorney general contends that the editor-in-chief of a newspaper is liable in a proceeding like this for contemptuous articles which appear in the columns of his paper, even though he had no knowledge of such articles until after their publication. The brief of the state contains an able argument in support of this proposition, fortified by decisions from courts of recognized ability and standing. We do not feel called upon now to enter upon a discussion of the question, or to decide it, although the point may be fairly raised by the record. We adopt this course, inasmuch as the defendant in his answer to the rule

to show cause why he should not be attached for contempt has expressly disclaimed any desire to evade responsibility for the publication in question by reason of the fact that he is the editor-in-chief of the different editions of the *Bee*, and because in his brief filed in this court he has cited no authorities in opposition to the principle contended for by the attorney general. Furthermore, conceding, for present purposes, the doctrine invoked by the state to be sound, yet the cause must be reversed for the reasons hereafter stated.

As already indicated, this conviction is based upon the same publication that was alleged to constitute a contempt in the Percival case. It was there shown that Percival did not write or cause to be published the caption or head-lines of the article; but that he did write the following: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth." The conviction in that case was reversed, the court holding that the language quoted was not *per se* libelous; that unaided by innuendo it did not apply to the court or reflect upon its integrity, nor tend to corrupt or embarrass the administration of justice; and that the article was susceptible or capable of an innocent interpretation. HARRISON, J., in the opinion filed therein, in commenting upon that portion of the article admitted to have been written by Percival, says: "It cannot be said, upon its face, to refer to any case pending at

the time it was written and published or to any designated case. In its terms it deals with some past transaction or proceedings. The phrase 'possessed of a pull' is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons, or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error and the proof made were insufficient to support a charge and conviction of contempt and sentence therefor." Upon a reconsideration of the question, aided by the briefs and arguments of counsel, we are fully satisfied with the conclusion there reached. That decision therefore controls this as to that portion of the publication set out in the information herein, which is not included in the head-lines or caption.

It remains to be determined whether the head-lines, either standing alone or when read in connection with the remainder of the publication upon which these proceedings are based, in law, constitute a contempt of court. We again quote that portion of the article set out in the information which we designate as the head-lines: "Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull." It will be observed that the foregoing, whether considered by itself or taken in connection with the rest of the article alleged in the information to be contemptuous, is

not *per se* libelous. It purports on its face to relate to proceedings past and ended, and to have no reference to any matter or cause at the time pending in court. The comments in question, unaided by innuendoes, cannot be said to be of a character tending to influence the decision of the court, or to impede, interrupt, or embarrass it in the exercise of its proper functions, and as the proofs fail to show that they were employed in their culpable sense they do not amount to a contempt of court. (*Hawes v. State*, 46 Neb., 149.) "Justice Without Equality" is a meaningless expression. No wrong or improper motive is imputed to the court or judge in the statement "Sentences Adjusted to Fit the Men." It is our understanding that sentences should be so imposed. A person convicted for his first offense, and who is young in years, ordinarily, ought not to receive so severe a punishment as an old, hardened criminal convicted of crime of the same grade. Some good citizens have expressed the thought that the courts of the country have not at all times adjusted their sentences to fit the men and their crimes. In other words, some criminals have been punished too severely, while others have received sentences so light as to amount to a travesty upon justice. The phrase, "the benefit of a pull," as was said in the Percival case, has no intelligible meaning. At least, in the connection in which it was used, we cannot say that it necessarily signifies that the court was corrupt, or unduly influenced. The part of the article complained of, in and of itself, casts no reflection upon the court. The defendant in his verified answer to the rule entered against him to show cause denies that the language of the publication is sus-

ceptible of the interpretation placed thereon by the innuendoes in the information, or that the defendant "did willfully, wrongfully, unlawfully, and contumaciously, and with the intent of bringing the district court of Douglas county which is presided over by Judge Cunningham R. Scott into public contempt, disrepute, or ridicule, or to destroy the influence, honor, and integrity of said court and said Cunningham R. Scott, as the judge thereof, or to have it believed that said court or the said Cunningham R. Scott, as judge thereof, was corrupt or influenced by corrupt motives, or for the purpose of destroying the efficacy of the court in the administration of public justice, or for the purpose of vilifying or traducing the said court or the judge thereof in the due administration of justice in any suit then and there pending." Considering the publication in connection with the above unequivocal denials in the answer of the innuendoes of the information, the conclusion is irresistible that the conviction cannot stand. The defendant insists that the language of the article was not employed in a libelous sense or with intent to cast reflections upon the court or judge. As it is capable of an innocent meaning, such a construction must be given it. The language made the basis of the charge preferred against the defendant is a very small segment of the article of which it formed a part. That portion of the article not set out in the information contains some very strong expressions which may have been a flagrant abuse of the liberty of the press. These proceedings are not, however, predicated thereon, and we do not wish to be understood as in any manner approving such portion of the publication. We are deciding the case alone

upon the fragment of the article which is set out in the information; and we hold that it is not contemptuous. The constitution guaranties that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty." (Constitution, art. 1, sec. 5.) But this constitutional right does not protect any person from punishment for contempt of court for publishing a newspaper article commenting upon a pending cause or proceeding when the publication is calculated to hinder, obstruct, or impede the due administration of justice. The power conferred upon a court to punish for contempt is to enforce respect and obedience to its authority, and is necessary to accomplish the objects and purposes for which it was created. The power is not given to compel sentimental respect. It is not every uncomplimentary comment or criticism upon a judge that he can afford to notice. "While the power to punish when contempts are really committed is one which should be exercised promptly in proper cases, yet it is in some respects an arbitrary power, and hence one which ought to be kept within prudent limits. This is particularly the policy of the law in regard to indirect contempts. (*Haskett v. State*, 51 Ind., 176.) No one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press. It is true that too often, under the guise of a guarantied freedom, the press transcends the limits of manly criticism and resorts to methods injurious to persons and tribunals justly entitled to the moral support of all law-abiding citizens, but such digressions are not always unmixed evils, and it is only in rare in-

stances that legal proceedings in repression of such a license can with propriety be resorted to." (*Cheadle v. State*, 11 N. E. Rep. [Ind.], 426.) While the power to punish for indirect contempt exists in the court, it should only be exercised when it is manifest that the publication was intended to bring the court into disrepute and to destroy confidence in it, and obstruct or embarrass the administration of justice. The record failing to present such a case, the judgment and sentence are reversed and the cause dismissed.

REVERSED AND DISMISSED.

47	638
52	652

JAMES L. CALLEN V. JOHN W. ROSE.

FILED MARCH 18, 1896. No. 6160.

1. **Chattel Mortgages: FORECLOSURE: CONVERSION OF CHATTELS BY MORTGAGEE.** A mortgagee of chattels in the foreclosure of his mortgage must comply substantially with the requirements of the statute, where they have not been waived by the mortgagor, and if the mortgagee fails to do so in an essential matter, he is liable to the mortgagor for the value of the property, less the mortgage lien thereon.
2. ———: ———: ———: **DAMAGES.** Evidence examined, and *held* that the damages assessed in this case are not excessive.
3. **Pleading and Proof.** Testimony must be confined to the issues tendered by the pleadings.
4. **Compromise: EVIDENCE.** Unaccepted propositions of compromise are inadmissible in evidence.
5. **Instructions: RECORD: REVIEW.** Where there are no instructions in the record brought to this court, none will be reviewed.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

J. R. Scott, for plaintiff in error.

Nightingale Bros. and Aaron Wall, contra.

NORVAL, J.

John W. Rose recovered a judgment in the sum of \$194 against James L. Callen for the conversion of certain chattels, which the defendant took from him under a chattel mortgage. Callen is a resident of Mills county, Iowa, and owns a farm in Sherman county, this state. Rose, during the transactions hereafter stated, occupied said farm as Callen's tenant. On October 24, 1889, Rose being indebted to Callen, gave him a chattel mortgage upon two horses, a mare, sixty head of hogs, two cows, three calves, and some farming implements to secure the payment of a claim of \$412.40, due November 1, 1890. Subsequently Rose butchered one of the cows, and disposed of part of the hogs, but the remainder of the property continued in his possession until in September, 1890, when, before the maturity of the mortgage debt, Callen seized the chattels under the mortgage, and disposed of most of them at private sale without advertisement, and without the mortgagor's consent, so he testified. The remainder of the property Callen converted to his own use. Rose sued for the value of the property, and Callen has brought error upon the judgment rendered against him.

It is the settled law of this state that the mortgagee of chattels in the foreclosure of his mortgage must comply substantially with the requirements of the statute, unless waived by the mortgagor, and that if he fails so to do in an essential

matter the mortgagor is entitled to have the value of the property applied upon the mortgage debt, and if such value exceeds such debt, the mortgagor may recover the difference from the mortgagee. (*Loeb v. Milner*, 21 Neb., 392; *Coad v. Home Cattle Co.*, 32 Neb., 762; *Rockford Watch Co. v. Manifold*, 36 Neb., 801; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 128.) The soundness of this rule is not now assailed, but it is claimed that the damages assessed by the jury are excessive; in other words, that the jury rendered a verdict for more than the excess of the value of the property above the amount due on the mortgage. Plaintiff below, in his testimony, gave a description of each piece of property, and testified to the market value thereof at the time it was taken, the aggregate estimate, according to his testimony, being over \$740. Jean Whitman, a witness for the plaintiff, who was acquainted with the chattels and their worth, in his testimony placed the value about \$90 less. The total amount of the mortgage lien, when the property was taken by the defendant, was \$450. A verdict for \$194 based upon the testimony of these witnesses was not excessive. It is true the witnesses for the defendant fixed the market value of the property considerably lower than that given by the other side, but it was for the jury alone to pass upon the credibility of the witnesses. Their finding being supported by sufficient testimony, cannot be molested by us.

The court excluded testimony offered by the defendant to show that one of the articles seized, a mower, had been previously mortgaged to another party by the plaintiff, and that the lien created thereby had not been paid. It claimed that this ruling of the court was erroneous; that

the defendant was entitled to have the amount of such mortgage deducted from the value of the mower. A sufficient answer to this contention is that no such issue was tendered by the pleadings. The defendant should have set up that fact in his answer; not having done so, he could not avail himself of it upon the trial.

Complaint is made of the exclusion of the testimony of one J. P. Braden relating to a conversation between defendant and plaintiff. It is disclosed that Braden went with Callen to see Rose in regard to the property, before it was taken, for the purpose of effecting a settlement with the latter. Propositions of compromise were made from one to the other, which were not accepted, and it was the conversation which on that occasion took place between them relating to the proposed settlement that defendant sought to prove. It was clearly inadmissible in evidence, and was properly excluded. (*Kierstead v. Brown*, 23 Neb., 595; *Eldridge v. Hargreaves*, 30 Neb., 638.)

It is finally insisted that errors were committed in the giving and refusing of the instructions. No particular instruction is pointed out in the brief as being bad, nor are we informed of the number of defendant's request to charge which it is claimed was wrongly refused. Besides no complaint is made either in the motion for a new trial or petition in error of any instruction. Furthermore, not a single instruction is to be found in the record before us, hence none will be reviewed.

This disposes of the questions discussed, and the judgment must be

AFFIRMED.

GEORGE BUSH V. STATE OF NEBRASKA.

FILED MARCH 18, 1896. No. 8203.

1. **Review: CONTINUANCE: RULINGS BELOW.** An assignment of error for the overruling of a motion for a continuance will not be considered by this court when the record fails to disclose that such motion was passed upon by the trial court.
2. **Instructions: EXCEPTIONS: REVIEW.** Instructions will not be reviewed unless the record shows they were excepted to when given.
3. ———: **REPETITIONS.** It is not error to refuse an instruction where the substance thereof has been given to the jury in other instructions.
4. **Burglary: EVIDENCE.** *Held*, That the evidence sustains a conviction for burglary.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

Coffin & Stone, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

NORVAL, J.

The defendant, George Bush, was tried and convicted on a charge of feloniously breaking and entering a dwelling-house in the night time with the intent to commit a larceny. Judgment and sentence of imprisonment in the penitentiary for the period of eight years were entered against him, from which he prosecutes error to this court.

The defendant's motion to strike out the unauthenticated statement of the trial judge, found in the transcript, of what transpired during the

proceedings, is sustained, as it is not made part of the record in this case.

It is argued that the court erred in overruling the defendant's motion for a continuance. With the statement above referred to eliminated from the record there is nothing to show that the defendant's application for a continuance was not granted, or if denied that an exception was taken to the ruling. This assignment is not, therefore, well taken.

Criticisms are made in the brief of the second, third, fourth, fifth, sixth, ninth, and tenth instructions given by the court on its own motion. The record fails to disclose that an exception was taken to the giving of any of said instructions, hence no foundation has been laid for their review here, and they will not be considered. (*Heldt v. State*, 20 Neb., 492; *Hill v. State*, 42 Neb., 519; *Carleton v. State*, 43 Neb., 373; *Grarely v. State*, 45 Neb., 878.)

The defendant requested twenty-one instructions, all of which were refused by the court, and an exception was taken to such refusal. We have examined the several requests to charge, and find that in so far as they correctly state the law applicable to the case they have been fully covered by the instructions given, therefore it was not reversible error to refuse to repeat them. (*Kerkow v. Bauer*, 15 Neb., 150; *City of Lincoln v. Smith*, 28 Neb., 762; *Olive v. State*, 11 Neb., 1.)

It is argued that the evidence failed to show that the breaking and entering of the building occurred in the night-time. If the state's witnesses are to be believed, the crime was committed during the night-season. There is in the record some evidence tending to show that it was

Livesey v. Hamilton.

daylight at the time the defendant effected an entrance to the building. The jury passed upon the conflicting evidence, and we discover no reason why their verdict should be disturbed.

AFFIRMED.

HENRY LIVESEY, APPELLEE, V. JOHN R. HAMILTON ET AL., APPELLEES, AND JAMES G. WINSTANLEY ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6351.

- 1 **Mechanics' Liens: WAIVER: NOTES.** The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.
2. ———: ———: ———. Where a party has furnished materials for the improvement of real property and in all respects has complied with the mechanic's lien law in respect thereto, his rights will not be *held* destroyed merely because in taking a note for the amount due he has described himself by the fanciful designation of the "Western Cornice Works," where there is no claim that thereby anyone was misled or injured.

APPEAL from the district court of Douglas county. Heard below before WALTON, J.

Weaver & Giller, for appellants.

Kennedy, Gilbert & Anderson and *Wharton & Baird*, *contra*.

RYAN, C.

The appellants in this case are James G. Winstanley and Jacob B. Emminger, purchasers of

certain real property from John R. and Francis Hamilton, by whom improvements thereof had been previously contracted for. The case was begun in the district court of Douglas county by Henry Livesey, as the assignee of a mechanic's lien held by John McGowan on account of services rendered and material furnished by him. The contract between McGowan and John R. and Francis A. Hamilton consisted of an oral acceptance of a written bid for doing certain of the work specified and for furnishing such material as therefor should be required. There was no necessity that this mere bid should be attached to the claim for a lien, for it was not a written contract.

It is urged that Livesey cannot maintain an action as the assignee of the claim for a lien, because such lien, as alleged, was not perfected when the assignment thereof was made. The filing was of date October 22, 1891. The assignment was made February 25 thereafter, so that the facts are not correctly assumed for the purposes of this argument. Before the claim for a lien was filed J. R. Hamilton gave his note for \$500, a part of the amount due to John McGowan, who indorsed the same to Henry Livesey, by whom it was discounted at a bank. Not being paid at maturity the note was taken up by Henry Livesey, who now holds the same as owner. As already stated, McGowan transferred to Henry Livesey his whole claim for a lien as an entirety. We, therefore, cannot understand how this assignment can be injuriously affected by the mere fact that Livesey holds a note for \$500 evidencing as due him a part of the claim in respect to which the mechanic's lien held by him was filed. There

was no evidence that this note was given or accepted as payment. Therefore, no good reason exists for treating it as a *pro tanto* satisfaction of the lien assigned to Livesey.

There was made a defendant Christian Specht, by whom there was filed a cross-petition in which he alleged that under a verbal agreement he had furnished material and performed labor in improving the real property above referred to; that after allowing all credits for payments made there still remained due \$280. There was in the cross-petition of Christian Specht this language: "This defendant further represents that as a part of said indebtedness the said John R. Hamilton executed and delivered to this defendant by the name, style, and description of Western Cornice Works, his promissory note for the principal sum of \$265," etc. There are urged in opposition to the enforcement of Mr. Specht's lien the objections that the above described note had been by him used as collateral security, and that whatever claim really exists is in favor of the Western Cornice Works and not in favor of Specht. As indicated by the language above quoted, the designation "Western Cornice Works" was not employed to indicate a corporation or company, but it was a picturesque and fanciful description of Mr. Specht, invented and used by himself. The evidence shows that he was the sole proprietor and manager of the business and property and controlled it absolutely, although in doing so its proprietorship and management were referred to by him as that of the "Western Cornice Works." By this fiction no one was deceived, and it is not suggested that any one interested was not aware of the identity of Christian Specht with the

Western Cornice Works. There was, therefore, no substantial reason for not granting the relief prayed by Mr. Specht, as was done in the district court, for no other objection has been urged except that there was not set up in connection with the claim for a mechanic's lien a written contract with Mr. Specht. This objection is of the same unsubstantial character as that which, in this action, was set up adversely to Henry Livesey, and must therefore be held unavailing.

No other question is discussed by the appellants, and the judgment of the district court is

AFFIRMED.

GEORGE A. BULL, APPELLEE, V. RUDOLPH MITCHELL ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6393.

1. **Mortgages: NEGOTIABLE INSTRUMENTS: PAYMENT.** Where a mortgage was made to secure payment of a negotiable promissory note, the parties making such note and mortgage are not necessarily entitled to protection as to payments to the mortgagee, made solely on the assumption that the original payee of the note still remained the holder thereof. Following *Eggert v. Beyer*, 43 Neb., 711, and *Stark v. Olsen*, 44 Neb., 646.

2. ———: ———: ———: **PRINCIPAL AND AGENT.** Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager and such payment was never forwarded to the party to whom such note had been transferred, *held*, that the mere fact that antecedent payments made in like manner had been made to be forwarded to the transferee of such note and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded,

47	647
49	643
49	648
51	840
53	629
53	789
55	640

47	647
59	650

47	647
62	466

Bull v. Mitchell.

it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent.

APPEAL from the district court of Colfax county. Heard below before MARSHALL, J.

The facts are stated by the commissioner.

Grimison & Thomas, for appellants:

The final payment was, in contemplation of law, made to the plaintiff. (*Columbia Mill Co. v. National Bank of Commerce*, 53 N. W. Rep. [Minn.], 1062; Herman, Estoppel, secs. 1079, 1080; *Swartz v. Leist*, 13 O. St., 424; *Smith v. Kidd*, 68 N. Y., 130; *Brewster v. Carnes*, 9 N. E. Rep. [N. Y.], 323.)

Payment to the mortgagee should be held to constitute a discharge and release of the mortgage. (*Johnson v. Carpenter*, 7 Minn., 176; *Hortsmann v. Gerker*, 49 Pa. St., 282; *Olds v. Cummings*, 31 Ill., 192; *Walker v. Dement*, 42 Ill., 273; *Bailey v. Smith*, 14 O. St., 396; *Bryant v. Vix*, 83 Ill., 11.)

The record disclosed a mortgage payable to Toncray. Under the record and as to Mitchell, Toncray could discharge the mortgage. (*Fisher v. Cowles*, 21 Pac. Rep. [Kan.], 228; *Lewis v. Kirk*, 28 Kan., 497; *Connecticut Mutual Life Ins. Co. v. Talbot*, 113 Ind., 373; *Swartz v. Leist*, 13 O. St., 419.)

Phelps & Sabin and *C. C. Flansburg*, contra.

References to question of agency: *Henn v. Conisby*, 1 Ch. Cas. [Eng.], 93; *Curtis v. Drought*, 1 Mol. [Irish Ch.], 487; *Whitlock v. Waltham*, 1 Salk. [Eng.], 157; *Williams v. Walker*, 2 Sandf. Ch. [N. Y.], 325; *Smith v. Kidd*, 68 N. Y., 130; *James v. Wilder*, 25 Minn., 312; *Lozier v. Horan*, 55 Ia., 75; *Armistead v. Armistead*, 10 Leigh [Va.], 525; *Fitler*

v. Beckley, 2 Watts & S. [Pa.], 458; *Osborne v. Baird*, 45 Wis., 189; *Wallace v. McConnell*, 13 Pet. [U. S.], 136; *Balme v. Wambaugh*, 16 Minn., 116; *Hills v. Place*, 48 N. Y., 520; *Caldwell v. Cassidy*, 8 Cow. [N. Y.], 271; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St., 62; *Caldwell v. Evans*, 5 Bush [Ky.], 380; *Ward v. Smith*, 7 Wall. [U. S.], 447; *Freeman v. Curran*, 1 Minn., 169.

References in reply to the contention that payment to the mortgagee should be held to constitute a discharge and release of the mortgage: *Webb v. Hoselton*, 4 Neb., 308; *Kühns v. Bankes*, 15 Neb., 92; *Mundy v. Whittemore*, 15 Neb., 647; *Cheney v. Janssen*, 20 Neb., 128; *Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Todd v. Cremer*, 36 Neb., 430; *Carpenter v. Longan*, 16 Wall. [U. S.], 271; *Wilson v. Troup*, 2 Cow. [N. Y.], 197; *Sargeant v. Howe*, 21 Ill., 148; *Vansant v. Allmon*, 23 Ill., 30; *Bridges v. Bidwell*, 20 Neb., 185; *Lee v. Clark*, 89 Mo., 553; *Treadwell v. Brooks*, 50 Conn., 262; *Scott v. Field*, 75 Ala., 419; *Burnhans v. Hutcheson*, 25 Kan., 625; *Williams v. Keyes*, 51 N. W. Rep. [Mich.], 522; *Dutton v. Ives*, 5 Mich., 515; *Reeves v. Hayes*, 95 Ind., 521.

RYAN, C.

There was a decree in favor of George A. Bull in the district court of Colfax county whereby was foreclosed a mortgage securing payment of a promissory note for the sum of \$1,000. Both the note and the mortgage bore date December 31, 1885; the maturity of the note was January 1, 1891. The makers were Anna Schuldt and John Schuldt, and the note, negotiable by its terms, was payable to the order of C. H. Toncray, and Toncray was likewise the mortgagee. Before this

loan matured the mortgaged premises were conveyed to Rudolph Mitchell, who, with his wife, was therefore made a defendant. The interest was evidenced by ten coupons, each of which was for the sum of \$37.50. On the original note and each coupon was indorsed these words:

“Pay to order of —, without recourse.

“C. H. TONCRAY.”

The Nebraska Mortgage & Investment Company was organized at Fremont in the early part of the year 1888. Of this company, C. H. Toncray was the vice president and manager until January 14, 1891, and its office was in the building in which the Farmers & Merchants National Bank transacted its business. Of this bank, C. H. Toncray was cashier until January 1, 1889, and G. W. Dorsey was its president until October, 1891. Previous to the organization of the Nebraska Mortgage & Investment Company, Mr. Dorsey and Mr. Toncray were making farm loans in Nebraska and selling in the eastern states the notes in this manner obtained. When Mr. Toncray had received the note which gave rise to this suit, with its coupons and mortgage, he sent them to Alfred Walker to be sold. Alfred Walker at this time was engaged in selling farm loans. Afterward, in October, 1888, he caused to be organized to carry on the same business the partnership firm of Alfred Walker & Co., which on February 1, 1890, was succeeded by a corporation under the name of “The Alfred Walker Company.” While there were the changes indicated, the line of business remained the same, and it was transacted at New Haven, Connecticut. There seems to have been no special arrangement between the brokerage concerns of which Alfred Walker constituted

the whole or only a part, on the one hand, and the party or parties who sent notes for sale on the other, further than that sales of the same nature as that above indicated were made. In respect to the subsequent transactions in relation to the note and its security under consideration further statements will be given hereafter.

The confidential clerk, who testified as to the transactions of the above mentioned brokerage with reference to the particular loan with which we are now concerned, said that this note, coupons, and accompanying security were sent to Alfred Walker by the Farmers & Merchants National Bank of Fremont, Nebraska, to be sold in Connecticut, and on this point there was no other direct evidence. It is very difficult to ascertain the facts with relation to the Nebraska part of the history of this entire transaction. It seems, however, that Anna Schuldt and John Schuldt lived in Colfax county, and that it was customary with them to send to C. H. Toncray, at Fremont, in Dodge county, the amount of each coupon as it matured. This was done by sending by some person or perhaps by the use of a draft of a bank near them. Within about a month after each amount had been sent their coupon would be returned to them from Fremont, marked "paid." This notation of payment was always made at Fremont. After Mr. Mitchell became the owner of the mortgaged property, he, on December 30, 1890, purchased from Mr. Folda, a banker, a draft for \$1,000 drawn on the First National Bank of Omaha in favor of the Nebraska Mortgage & Investment Company. This draft, in compliance with the request of Mr. Mitchell, was sent for Mr. Mitchell by Folda to Mr. Toncray at Fremont to

take up the note of Anna and John Schuldt which matured January 1, 1891. From the testimony of Charles Collins we learn that in December, 1891, he was appointed receiver of the Nebraska Mortgage & Investment Company. With the testimony of this witness there was submitted a page of the loan register used by the Farmers & Merchants National Bank of Fremont and a page of the ledger of the Nebraska Mortgage & Investment Company. Upon the bank's loan register with respect to the loan made by C. H. Toncray to Anna and John Schuldt appears the following entry: "Paid in full Jany. 5—91. Pd. by R. Folda for Rudolph Mitchell, Schuyler, Nebr." On the page of the ledger of the Nebraska Mortgage & Investment Company there appears the following entries:

1891.	Alfred Walker & Company, Cash.	Cr.
Jany. 5th.	A. Schuldt.....	\$1,000.00
1890.		
Dec. 30.	Anna Schuldt.....	37.50

It is unfortunate that Mr. Toncray did not give his testimony to assist in unraveling this affair, but, as he did not, we must now consider who must suffer for his misconduct in the light of such evidence as is available for that purpose. It is very clear that Mrs. Schuldt and Mr. Mitchell assumed that they could safely make payments to Mr. Toncray, and acted accordingly. The note upon which these payments were made was negotiable, and therefore it was not sufficient to entitle to protection for them to pay to the original mortgagee as such. (*Eggert v. Beyer*, 43 Neb., 711; *Stark v. Olsen*, 44 Neb., 646.) Another principle which operates to the disadvantage of these parties in respect to the payments made by them is

thus stated in *First Nat. Bank of Omaha v. Chilson*, 45 Neb., 257: "One paying money to another, to be applied on a note which such person has not in his possession, assumes the burden to show the authority of the person to whom payment is made to receive the money. (*South Branch Lumber Company v. Littlejohn*, 31 Neb., 606.)" Even if there had been introduced no other evidence, it is extremely doubtful whether that submitted by appellants to show payment was sufficient for that purpose. The payments of interest in each instance were sent to Toncray. He for several years was acting as cashier of a bank and was manager of a mortgage and investment company. During this time there is no evidence that individually he was transacting any business. About a month after each payment of a coupon was made it was returned to the makers bearing an indorsement showing that Mr. Toncray had probably parted with all interest in it. It does not appear that there was ever any inquiry excited by this fact, neither are we informed that between Toncray and the mortgagors there was ever any inquiry made or instructions given upon any subject. The reliance of the mortgagors evidently was upon the fact that in the first instance they had borrowed of Mr. Toncray and had executed to him their note and mortgage. Even if this showing standing alone was sufficient to raise a presumption of payment to a purchaser of the note, this doubt would be dispelled by the rebutting evidence furnished by Mr. Walker and Mr. Bull, by which it was made clear that Mr. Bull purchased the note from Mr. Walker, who was acting not as a general agent for Mr. Toncray, but as a broker generally for the sale of such evi-

dences of indebtedness, and that thereafter Mr. Bull only presented the coupons to Mr. Walker for payment as they matured and never constituted Mr. Walker his agent for any purpose, except on one occasion to have the note registered by state authority to exempt it from taxation. Such interest as was paid was remitted from Nebraska to Mr. Walker, or one of the companies which succeeded him, by whom it was paid to Mr. Bull, and the coupon in each instance paid was, without being canceled, sent to Fremont. Both Mr. Bull and Mr. Walker testified that Mr. Walker was never employed to act for Mr. Bull, and from Mr. Walker's evidence it is clear that he received no compensation for receiving or remitting payment of the coupons. His services in this regard seem to have been donated in consideration of the commission which he had originally received from the seller of the note for making the sale. We cannot see how Mr. Bull could do less than he did to encourage the mortgagors in making their payments as they were made, and most certainly the exercise of such care as knowledge that the note was negotiable and the means of knowing it had probably been negotiated would have called for was wanting on the part of the mortgagors. Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of. (*City Nat. Bank of Hastings v. Thomas*, 46 Neb., 867; *Scroggin v. Johnston*, 45 Neb., 714.) Mr. Mitchell predicates his right to protection in paying the principal sum upon the course of dealing to which the mortgagors had been parties. The failure of this to protect these mortgagors in like degree operated

Carter v. Gibson.

against Mr. Mitchell, even if he was in a position to avail himself of it,—a question rendered somewhat doubtful by the fact that he caused the final remittance to be made to the Nebraska Mortgage & Investment Company, and not to C. H. Toncray, as had his predecessors in liability. The judgment of the district court is

AFFIRMED.

JOHN M. CARTER, APPELLANT, V. BENJAMIN A.
GIBSON, APPELLEE.

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61 207

FILED MARCH 18, 1896. No. 6283.

Judgment Foreign to Issues: REVERSAL: PLEADING. A judgment foreign to the issues joined and for which there was no prayer by the party in whose favor it was rendered, must, upon appeal, be reversed in the supreme court.

APPEAL from the district court of Cass county.
Heard below before CHAPMAN, J.

H. D. Travis and A. M. Russell, for appellant.

Wooley & Gibson, contra.

RYAN, C.

The issues presented in this case were fully described in *Carter v. Gibson*, 29 Neb., 324. After the case had been remanded there was a trial in the district court, and upon findings of fact there was a decree, which plaintiff seeks to review by this his appeal.

The action was brought by John M. Carter, as *cestui que trust*, against Benjamin A. Gibson, as

trustee, to compel an accounting by the latter with respect to lands by the *cestui que trust* entrusted to the trustee to sell for the payment of certain enumerated debts owing by Carter to different parties, among whom was B. A. Gibson. The prayer of plaintiff's petition was for an accounting of the moneys, notes, and securities received by B. A. Gibson in consideration of the sale of any of said land, with interest thereon; that said Gibson be required to account for the actual value of such land as had been sold to Francis N. Gibson; that of the proceeds of the sales made by him, B. A. Gibson be required to apply on the indebtedness of Carter a sufficient amount to extinguish it; that B. A. Gibson be required to pay the balance of such proceeds to plaintiff and cancel the liens named in the contract between plaintiff and defendant; that B. A. Gibson be enjoined from disposing of any more of said land; "that he may do all things as agreed, and that plaintiff may have such other and further relief as justice and equity may require." By his answer, B. A. Gibson described the particular debts with respect to the payment of which Carter had caused to be conveyed the real property in trust, and described various transactions which he alleged entitled him to credits on such amounts as he had realized from sales of portions of said land, and finally denied that defendant was in any manner liable to account to plaintiff under the agreement set forth in plaintiff's petition, or under any other agreement, for any lots or land sold by defendant. Following this averment there was this prayer: "Hence the defendant asks that the plaintiff's bill filed in this action be dismissed at his costs, and that this defendant may be accorded such further

relief as may be just and equitable." There was a reply, which requires no special notice in this connection.

The portion of the decree from which specially Carter prosecutes this appeal was in the following language: "It is hereby ordered, adjudged, and decreed that there is due the defendant Gibson from the plaintiff John M. Carter the sum of \$3,754.21, which is made a lien on the lands hereinafter described." In connection with the facts pursuant to which the above figures were reached there was filed a paper of which the heading was "Computation by the Court." The first item of this computation was a charge of "Carter's indebtedness," drawing interest at ten per cent per annum, \$2,658.73. The next item was interest thereon to August 1, 1887, \$22.15, making a total of \$2,680.88. From this were deducted proceeds of sales, \$1,581.95, leaving a balance of \$1,098.93. There were then alternate additions of interest and credits of sales until the balance due was \$127.43 on December 1, 1887. To the amount last named there was added "indebtedness of note due F. N. Gibson, principal and interest at nine per cent to December 1, 1887, \$1,981.75." The sum of \$127.43 and the sum of \$1,981.75 were added together and upon this total there were credited "proceeds of sales for November, 1887, \$212.95." By reason of interest accrued and credits for sales this amount was reduced to \$145.88 on May 1, 1888. This balance, to constitute a new principal, was added to \$5,914.52, described as "amount due on claim Connecticut River Savings Bank, July 1, 1887." To this was added interest on the last named amount to May 1, 1888, \$443.50. The grand total thus made up was then credited

with sales to May 1, 1888, \$1,050, and thereafter were additions of accruing interest and reductions by amount of sales alternately, until on December 15, 1892, there still remained a balance of \$3,209.21. To this was added the commission allowed the trustee for his services, of the sum of \$545. In this way there was ascertained, as expressed in the above mentioned computation, the "Total amount due, which is a lien on the real estate held by the trustee, \$3,754.21." It has already been stated that by the court it was "ordered, adjudged, and decreed that there is due the defendant Gibson from the plaintiff John M. Carter the sum of \$3,754.21." This was, in terms, made a lien on the lands in the aforesaid decree described as still remaining unsold. As the finding of facts was referred to in the judgment entry as constituting a part thereof, there is no impropriety in making reference to it for the purpose of rendering clear the matters hereinafter to be discussed.

From the brief description of the pleadings hereinbefore given it is very clear that there was no prayer for judgment against Mr. Carter. In his answer B. A. Gibson alleged that there was due from Carter to the Connecticut River Savings Bank about \$4,200, and to Francis N. Gibson about \$1,700, and to B. A. Gibson himself about \$3,800. The computation by the court above referred to took up each of these three items in the inverse order of their being named herein and first extinguished the claim due B. A. Gibson, then likewise treated that of F. N. Gibson. To the claim of the savings bank, of \$5,914.52, due July 1, 1887, was added interest thereon till May 1, 1888, and the sum of these two items was added to

the balance of \$145.88 still unpaid to F. N. Gibson, and the grand total, with interest on it up to December 15, 1892, was reduced to \$3,209.21. This last balance was by the computation recognized as being due to the Connecticut River Savings Bank. B. A. Gibson, so far as the record shows, had nothing to do with it except that he held as trustee certain real property to be by him sold, and with the proceeds of which sales he was by contract charged with the duty of making payments to said savings bank. The contract by virtue of which he became such trustee was made between himself and John M. Carter. The privity was between Gibson and Carter; there was none between Gibson and the savings bank. It was therefore erroneous to render a judgment in favor of B. A. Gibson against Mr. Carter. Even if there had been such a relation between B. A. Gibson and John M. Carter that the former might be entitled to relief against the latter, such relief could not be granted upon the issues actually joined, for such relief was not therein sought. The action was brought by Carter to compel Gibson to account as trustee. It resulted in a judgment in favor of the latter against the former for an amount by all parties confessedly due to a bank which was not a party to the action. It is not necessary to review the processes, step by step, by which the court reached the conclusion that there was due from Carter to Gibson the exact amount stated in its decree, for, as we have already clearly shown, whatever this balance was, it was due a bank not a party to this action, and the decree entered was foreign to the issues presented for determination. Whether or not the amount allowed for the services of B. A. Gibson

can be created a lien upon the lands entrusted to him for sale will not be determined in this action. Such real property as remained unsold at the time the judgment appealed from was rendered, and has not since been properly disposed of, should be required to be sold in such manner as shall be deemed by the court to be advisable, and thereupon a final accounting should be had between the parties to this action. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE A. MCCALL V. STATE OF NEBRASKA.

FILED MARCH 18, 1896. No. 7359.

Criminal Law: RECORD FOR REVIEW. When the grounds of complaint of a plaintiff in error depend upon the existence of certain facts in respect to which there is no recitation or evidence in the record, such assignments of error must be disregarded in the supreme court.

ERROR to the district court for Dawes county.

• **Tried below before KINKAID, J.**

Allen G. Fisher, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

RYAN, C.

In the district court of Dawes county plaintiff in error was convicted of carnally knowing and abusing, with her consent, a female child of the age of thirteen years. It is first insisted in his

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behalf that while the information before the examining magistrate charged the same offense as that charged in the district court, the evidence tended to show that there had been committed a rape by the use of violence. As there is no bill of exceptions, this statement of counsel cannot be verified, and hence must be disregarded.

It is said by counsel in the brief submitted in behalf of the plaintiff in error that there were irregularities in the charging, in the absence of said counsel, a jury which had failed to agree upon a verdict. There is found in the record no evidence of this alleged fact. It cannot be assumed to exist and the argument based thereon must be disregarded. So also of the claim that a *nunc pro tunc* order was improperly made, and that the defendant was sentenced in vacation. The judgment of the district court is

AFFIRMED.

J. D. MACFARLAND V. WEST SIDE IMPROVEMENT ASSOCIATION.

47	861
53	421
47	861
56	142

FILED MARCH 18, 1896. No. 7635.

1. **Trial: EVIDENCE: LEAVE TO WITHDRAW DOCUMENTS: PRACTICE.** A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.
2. **Bill of Exceptions: AMENDMENTS: EXHIBITS: PRACTICE.** This court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of

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exceptions; and especially is this true where it appears that a failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment.

2. ———: ———: ———: ———. The plaintiff in error filed here a bill of exceptions from which two exhibits introduced in evidence on the trial of the case in the district court were omitted. These exhibits, when introduced in evidence, were by counsel for defendant in error, by leave of the court, withdrawn, but counsel did not then nor afterward furnish the court reporter with copies of such exhibits. *Held*, That leave would be granted plaintiff in error to withdraw the record here for the purpose of submitting the bill of exceptions to the trial judge, on application for amendment.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J. Heard on motion of plaintiff in error for leave to withdraw the record for the purpose of submitting to the lower court an application to insert exhibits omitted from the bill of exceptions. *Motion sustained.*

A. G. Greenlee, for the motion.

Ricketts & Wilson, contra.

RAGAN, C.

This is an application of the plaintiff in error for leave to withdraw the record for the purpose of having the bill of exceptions amended by inserting therein two exhibits which he alleges were introduced in evidence on the trial of the case and by inadvertence omitted from the bill of exceptions when signed and allowed by the trial court. The application is resisted by the defendant in error, and the evidence as to whether these exhibits were in the bill of exceptions when presented to the trial judge for allowance is con-

flicting. The affidavits filed by the defendant in error in resistance of this application are to the effect that the exhibits in question were introduced in evidence on the trial of the case; that counsel for the defendant in error then asked and obtained leave of the court to withdraw said exhibits; that they did withdraw the exhibits and have since retained them in their possession; that neither at the time they withdrew them nor since did they furnish the official court reporter with copies of the exhibits withdrawn. On this evidence alone we think the application of the plaintiff in error should be sustained. A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it at the time leaves with the reporter a concededly correct copy of the document withdrawn. The furnishing to the reporter of such copy should be made a condition precedent by the court of the leave to withdraw the original document. It appears from the affidavit of the judge who tried this case in the court below that he did not decide it until the evidence had been type-written and presented to him, and at that time neither of the exhibits in question, nor copies thereof, were in the type-written evidence. We think that the failure of the present bill of exceptions to contain these exhibits is due to the fact of defendant in error's counsel withdrawing the exhibits after they were introduced in evidence and not supplying the reporter with copies thereof. This court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true where it appears that the failure to incorporate into the bill of exceptions

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all the evidence is due to the laches of the party seeking the amendment. Here the court has jurisdiction of the subject-matter and of the parties to the action. The record before us shows that the exhibits in question were introduced in evidence. There is no dispute whatever as to their identity, and it appears that the defect in the bill of exceptions is probably due to the conduct of counsel for the defendant in error in withdrawing the exhibits and not at the time supplying the court reporter with copies thereof.

The motion of the plaintiff in error for leave to withdraw the record for the purpose of having the bill of exceptions submitted to the trial judge on application for amendment is sustained. Record to be returned to this court in twenty days.

MOTION SUSTAINED.

WILLIAM KINSELLA V. J. C. SHARP, ADMINISTRATOR.

47	664
158	173

FILED MARCH 18, 1896. No. 6307.

1. **Party in Interest.** The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit.
2. **Sales: GIFTS: CONVERSION: PARTIES.** Except as against his creditors, one may sell his property for a nominal consideration or give it away; and if he does either, his vendee or donee is the real party in interest in a suit for the conversion of such property.
3. **Action Against Sheriff: DAMAGES: EVIDENCE.** Evidence examined, and *held* wholly insufficient to sustain the verdict of the jury.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

E. C. Page, for plaintiff in error.

References: *Cooper v. Reynolds*, 10 Wall. [U. S.], 308; *Pennoyer v. Neff*, 95 U. S., 714; *Sherman v. Hogland*, 54 Ind., 578; *Albertoli v. Branham*, 80 Cal., 631; *Wake v. Griffin*, 9 Neb., 47; *Ahlman v. Meyer*, 19 Neb., 66; *Dunbier v. Day*, 12 Neb., 596.

Joel W. West and *Hall & McCulloch*, contra.

RAGAN, C.

In July, 1890, one Herman Deiss brought an action in the district court of Douglas county against the Western Dry House & Construction Company, and caused an attachment to be issued and levied upon certain personal property as the property of the construction company. Subsequently, William Kinsella brought this action in replevin for the attached property against the sheriff of Douglas county, but failing to give the bond required by statute, the property was returned to the sheriff and by him disposed of to satisfy the judgment rendered in the attachment suit of Deiss. Kinsella's action proceeded against the sheriff as one for damages. The sheriff died pending the action and it was revived against Sharp, his administrator, who had a verdict and judgment, to reverse which Kinsella prosecutes to this court a petition in error.

The first assignment of error argued is that the verdict is not supported by sufficient evidence. After as patient and careful an examination of the record as we are capable of making we have

reached the conclusion that this assignment of error must be sustained. There is absolutely no evidence in the record that will support this verdict. One point insisted on before the jury by defendant in error, and submitted to them, was that Kinsella was not the real party in interest; and counsel for the defendant in error now insist that the general finding of the jury includes a finding that Kinsella was not the real party in interest, and that such finding is sustained by sufficient evidence. If the jury reached the conclusion it did by finding that Kinsella was not the real party in interest, the verdict still lacks evidence to support it. The undisputed evidence in this record is that at the time Deiss attached the property in controversy, and long prior to that time, one George Hinchliff was the owner of and in the possession of the property attached. After the attachment suit was brought Hinchliff sold this property to Kinsella. Both Hinchliff and Kinsella testified as to the sale made by the former to the latter of the property in controversy and the consideration paid for it, and their evidence is uncontradicted. Counsel for the defendant in error contend that the jury was justified in believing that Kinsella did not pay Hinchliff any consideration for the property, notwithstanding the evidence. We do not think the jury would have been justified in any such a course, as the evidence stood undisputed; but the sheriff in this action occupies precisely the position that Deiss himself would occupy had he been sued for the conversion of this property; and since Deiss was not a creditor of Hinchliff, it is no concern of the sheriff whether Kinsella paid a valuable consideration to Hinchliff for the property or not. As

Regier v. Shreck.

the property attached was Hinchliff's property, he had a right, except as against his creditors, to sell the property for a nominal consideration to Kinsella or to give it to him, and if he did either, Kinsella was the real party in interest. The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit. (*Hoagland v. Van Etten*, 22 Neb., 681.) The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN REGIER V. GEORGE W. SHRECK ET AL.

47	667
51	260
52	405

FILED MARCH 18, 1896. No. 6352.

- 1 **Review: REMITTITUR.** Where the only reversible error in the record is that the amount of the recovery is excessive, this court will affirm the judgment upon the excess being remitted, if the evidence will support the remainder of the finding.
2. **Evidence.** The law requires the production of the best evidence obtainable, and if the primary evidence is lost, then secondary evidence satisfies the rule.
3. ———: **LOST RECORDS.** Where the files of a case have been lost,—such as papers in an attachment proceeding,—that such papers existed, and their contents, may be proved by parol, the proper foundation having been laid for the introduction of secondary evidence.
4. ———: **ORIGINAL PAPERS AND OFFICIAL RECORDS: PRACTICE.** The practice of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records of an office, is not to be commended. If such files or records are needed as evidence certified copies should be procured for that purpose.

5. Fraudulent Conveyances: BONA FIDE PURCHASERS: ATTACHMENT: DAMAGES. Certain instructions of the trial court set out in the opinion and approved.

ERROR from the district court of York county.
Tried below before BATES, J.

George B. France, for plaintiff in error.

C. P. Halligan and Harlan & Harlan, contra.

RAGAN, C.

This is an action in replevin brought in the district court of York county by John Regier against George W. Shreck and James Powers, the sheriff and a constable of said county. Shreck and Powers had a verdict and judgment, and Regier brings the case here for review.

1. The first assignment of error is that the judgment is excessive. The jury found the value of the interest of the defendants in error in the property to be \$975. The court ordered a remittitur of \$100, and rendered judgment against the plaintiff in error for \$875. The interest of the defendants in error in the property arose from certain executions and orders of attachment which they had levied upon it at the suits of certain creditors of one Gerhard Regier, of whom John Regier claimed to have purchased the property. An examination of the record leads to the conclusion that the amount of the liens which the defendants in error had against this property at the time the judgment was rendered was \$833 only, and that the judgment is \$42 too large. Counsel for the plaintiff in error insists that this error alone should work an absolute reversal of the judgment; but the doctrine and practice of

this court are contrary to the contention of counsel. (See *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Boston Tea Co. v. Brubaker*, 26 Neb., 409; *Meharry v. Halligan*, 29 Neb., 565; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *City of Friend v. Ingersoll*, 39 Neb., 717; *St. John v. Swanback*, 39 Neb., 841; *Omaha & R. V. R. Co. v. Ryburn*, 40 Neb., 87; *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb., 159; *Gordon v. Little*, 41 Neb., 250; *Culbertson Irrigating & Water Power Co. v. Wildman*, 45 Neb., 663; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb., 907.) In all of these cases the judgments were affirmed upon condition that the defendants in error file remitturs. These are not all the cases in which this practice has been followed, but they are sufficient to show what the practice of the court is; and they establish the rule that where the only reversible error in a record is that the amount of the recovery is excessive this court will affirm the judgment upon the excess being remitted if the evidence will support the remainder of the finding.

2. The second assignment of error is in the following language: "The court erred in admitting in evidence the several judgments recovered against Gerhard Regier before Justice Fay." At least some of the judgments introduced in evidence were properly admitted, and as the assignment is that the court erred in admitting all the judgments, the assignment, without further examination, will be overruled.

3. The third assignment of error is in the following language: "The court erred in admitting in evidence before the jury the testimony of the witness Halligan, in reference to the affidavits, orders of attachment, and attachment proceed-

ings had before Justice Fay." As already stated, the defendants in error had seized the property replevied on certain executions and orders of attachment against Gerhard Regier. It appears, also, that this case was twice tried in the district court of York county, and on the second trial the various orders of attachment issued by the justice and the other papers in the attachment proceedings could not be found, and the court, after the proper foundation was laid, permitted the attorney who prepared the attachment papers to testify as to their contents. We do not think the court erred in doing this. The law only requires the production of the best evidence obtainable, and if the primary evidence in a case is lost, then secondary evidence satisfies the rule. In *Keller v. Amos*, 31 Neb., 438, it was held: "Where papers in a case have been lost, as the license to sell real estate, proof that such license or other papers actually existed at the time of the sale may be shown by parol or other secondary evidence." The practice often indulged in of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records from an office, is not to be commended. The records of a public office belong in that office and should never be taken therefrom except in case of emergency. If parties desire to introduce in evidence the record of a mortgage or a deed they should procure from the officer having the custody of the record a certified copy of the instrument which they wish to introduce; and if parties desire to introduce in evidence an order of attachment or any other process or pleading belonging to another case, they should not use the original files, but certified copies.

4. The fourth assignment of error is that the verdict is not sustained by sufficient evidence. Without quoting the evidence or any part of it we have no hesitancy in saying that it supports the verdict.

5. The fifth assignment of error is "errors of law occurring at the trial and duly excepted to." This assignment is sufficient in a motion for a new trial to challenge the attention of the trial court to any error it may have committed in the admission or rejection of evidence, but it is too indefinite in a petition in error to enable the supreme court to review anything.

6. The sixth assignment of error is that the court erred in giving instruction No. 3 on motion of the defendants in error. The instruction is as follows: "To constitute a *bona fide* purchaser such purchaser must have parted with something that is valuable upon the faith of his purchase before he had knowledge or notice of any prior right or equity." This is the precise language of this court in *Gregory v. Whedon*, 8 Neb., 373, and the instruction is also supported by the decision of this court in *Savage v. Hazard*, 11 Neb., 323. The instruction was correct.

7. The seventh assignment relates to an instruction given by the court in the following language: "You are further instructed that if you find from all the circumstances and facts taken together that Gerhard Regier executed and delivered a bill of sale of the property in question to the plaintiff for the purpose of and with the intent of hindering, delaying, and defrauding the creditors of the said Gerhard Regier; and if you further find that the plaintiff had knowledge or notice of such fraudulent intent or design on the part of

the said Gerhard Regier or had knowledge of such facts or circumstances as would have aroused the suspicions and put an ordinarily prudent man upon inquiry, which inquiry if pursued would have led to a knowledge or notice of such fraudulent intent on the part of the said Gerhard Regier, then your verdict should be for the defendants, even though you should find that the plaintiff paid a full, adequate consideration for said property." Under the evidence in this case we think this instruction was proper.

8. The eighth assignment of error relates to instruction No. 10 given by the court upon its own motion. The substance of this instruction was that if the jury found for the defendants in error, the measure of their damages would be the aggregate amounts due on the several executions and orders of attachment under which they held possession of the property; not to exceed, however, the value of the property. This was correct.

The defendants in error will have leave to remit \$42 from the judgment rendered, as of the date of the judgment, within forty days from this date; and if they do so, the judgment of the district court will be affirmed; otherwise it will stand reversed.

JUDGMENT ACCORDINGLY.

WILLIAM B. TAYLOR V. STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

FILED MARCH 18, 1896. No. 6328.

- 1. Principal and Agent: CONTRACT OF EMPLOYMENT: ALTERATION: EVIDENCE: LIABILITY OF AGENT'S SURETIES.** A contract between an insurance company and its agent provided that the latter should make monthly reports of business transacted and on demand pay over to his principal all moneys due him. The agent's compensation was fixed at twenty-five per cent of the business done and he gave a bond to secure the performance of his contract. After the execution of the bond, and without the knowledge of the surety thereon, the agent's compensation was changed to twenty-eight and one-third per cent, and he was given permission to employ solicitors of insurance, paying them out of his commission. In a suit against the surety on the bond to recover money which it was alleged the agent had not accounted for, *held*, (1) that the compensation of the agent was not an essential ingredient of the contract of the surety; and increasing his compensation did not amount to a re-employment of the agent at a different compensation from that fixed in the contract; (2) that there had been no material alteration in the terms of the contract to secure the performance of which the bond was given, and that the surety thereon was not released.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated in the opinion.

Frank T. Ransom, for plaintiff in error:

There was a clear departure from the terms of the contract. The testimony offered to prove the alteration in the terms of the agreement should have been received. (*Hibbs v. Rue*, 4 Pa. St., 348; *Anderson v. Bellenger*, 87 Ala., 334; *Farnsworth v.*

Taylor v. Standard Life & Accident Ins. Co.

Coots, 46 Mich., 117; *Kimball v. Baker*, 62 Wis., 529; *Stull v. Hance*, 62 Ill., 52; *Phillips v. Singer Mfg. Co.*, 88 Ill., 305; *Brandt*, Suretyship, sec. 397, and cases cited.)

George W. Ambrose and Frank H. Gaines, contra.

References: *Atchison & N. R. Co. v. Washburn*, 5 Neb., 123; *Stoddard v. Onondaga Annual Conference*, 12 Barb. [N. Y.], 573; *McKyring v. Bull*, 16 N. Y., 308; *Peet v. O'Brien*, 5 Neb., 363; *Laurence v. Wright*, 2 Duer [N. Y.], 674; *Van Schaich v. Winne*, 16 Barb. [N. Y.], 90; *Schenck v. Naylor*, 2 Duer [N. Y.], 675; *Chamberlain v. Gorham*, 20 Johns. [N. Y.], 145; *Reynolds v. Rogers*, 5 O., 170; *Straubridge v. Baltimore & O. R. Co.*, 14 Md., 360; *Minor v. Mechanics Bank*, 1 Pet. [U. S.], 73.

RAGAN, C.

On the 23d day of September, 1890, one M. C. Nichols was a general or district agent of the Standard Life & Accident Insurance Company of Detroit, Michigan, hereinafter called the "Insurance Company." On that date he appointed one R. C. McClure his agent, for the purpose of canvassing for applications for insurance in the Insurance Company, issuing policies and tickets therefor, and attending to such other duties as might properly appertain to the agency in and for the city of Denver, Colorado. By the terms of McClure's contract of employment, which was in writing, he agreed to keep regular and accurate statements of all the transactions and business done by him as Nichols' agent, and on or before the 10th of each month transmit to Nichols a report in detail of the business transacted up to and including the last day of the previous month.

These reports were to show the balance for which McClure was accountable by reason of his agency. The contract of employment provided further that McClure should hold in trust for Nichols all moneys and securities collected and received by him as agent, and faithfully pay over and account for the same to Nichols or to the Insurance Company, or its representative, in case of Nichols' resignation, removal, or death. On the 24th day of September, 1890, McClure as principal, and W. B. Taylor as surety, executed a bond to Nichols, conditioned for the faithful performance by McClure of his agreements in his said contract of employment as Nichols' agent. Nichols brought this action in the district court of Douglas county against Taylor, the surety on the bond, to recover a sum of money which he alleged McClure had collected as agent and failed to account for and pay over. By agreement of counsel the Insurance Company was substituted in the district court as plaintiff for Nichols. It had a verdict and judgment and Taylor prosecutes to this court a petition in error.

1. The first assignment of error argued in the brief here relates to the ruling of the district court in excluding evidence offered by Taylor to prove that the principals in the bond had changed the contract to secure the performance of which the bond sued on was given, or, in effect, that whatever money McClure had collected and failed to account for while agent of Nichols, he had collected under a contract made between Nichols and McClure subsequent to the date of the contract of the 23d of September, 1890, and materially different from said contract. Taylor, in his answer, admitted the execution of the con-

tract of September 23d, 1890, between Nichols and McClure, the execution of the bond sued upon, and substantially denied all the other allegations in the petition. Another defense interposed by Taylor was that from the time of the execution of the contract of the 23d of September, 1890, McClure made regular monthly reports to Nichols; that said reports showed what was due from McClure on account of his agency; that Nichols, upon receipt of said reports, did not insist on McClure paying the amount which the report showed he owed, but allowed McClure to retain said amounts and extended the time within which the said sums of money might be paid. Another defense of Taylor was that Nichols, knowing that McClure was in default, neglected to notify Taylor, the surety, of the fact and continued to deal with McClure and allow him to continue to act as agent under the contract and bond. A still further defense pleaded by Taylor was that Nichols was guilty of negligence in not demanding from McClure on the 10th of each month, when he made a report, the amount of money for which the report showed he, McClure, was indebted, and was guilty of negligence in neglecting to notify Taylor of the condition of McClure's accounts. Neither argument nor citation of authority is necessary to show that under this answer the plaintiff in error was not entitled to have the evidence he offered go to the jury. If the principals to the contract, to secure the performance of which by McClure the bond was given, materially modified that contract so that the money collected by McClure and not accounted for by him was in fact collected under a contract materially different from the one to

secure which the bond sued on was given, then that fact should have been pleaded as an affirmative defense. The fact, if it existed, was new matter and could not be proved under a general denial.

2. The second assignment of error argued relates to the refusal of the district court to give the jury the following instruction: "If you believe from the evidence that up to the 3d day of June, 1891, the said R. C. McClure acted as agent, under the contract of September 23, 1890, for the plaintiff, and up to that date he paid over to the plaintiff or its agent all moneys coming into his hands by virtue of the agency, and that about that date said McClure and the plaintiff modified the contract of September 23, 1890, by a letter of June 3, 1891, and that all the money for which said McClure is now in default was collected by him as agent of the plaintiff under the modification of June 3, 1891, you will find for the defendant, W. B. Taylor." The letter introduced in evidence, by which plaintiff in error claims that the contract of the 23d of September, 1890, was modified by Nichols and McClure, conceded to McClure a commission on all new business of twenty-eight and one-third per cent, whereas under the contract of September 23, 1890, McClure's commission on business was to be twenty-five per cent. This change in the amount of compensation which McClure was to receive in no manner changed the duties of McClure and did not amount to a material modification of the contract between McClure and Nichols; and were it competent and relevant evidence, it would not prove or tend to prove a material alteration of the contract to secure the performance of which the bond in suit was given.

State Bank of Lushton v. Kelley.

(*Domestic Sewing Machine Co. v. Webster*, 47 Ia., 357; *Amicable Mutual Life Ins. Co. v. Sedgwick*, 110 Mass., 163.) The letter also authorized McClure to secure or appoint solicitors of insurance if he should think best, on the basis that his, McClure's, commission was to be twenty-eight and one-third per cent on new business, the persons so appointed as solicitors by him to be paid their commission out of the commission allowed him, McClure. This was not adding to the obligations or duties required of McClure by his contract, and not a material alteration of it. In other words, the risk which the surety assumed in signing McClure's bond was not increased nor indeed changed by this letter. The letter itself was irrelevant testimony under the issues made by the pleadings and should not have been admitted. But the letter as evidence did not have the effect claimed for it by the plaintiff in error. The compensation of McClure was not an essential ingredient of the contract of the surety, nor did this letter amount to a re-employment of McClure at a different compensation. The court did not err in refusing to give the instruction. The judgment of the district court is right and is in all things

AFFIRMED.

**STATE BANK OF LUSHTON V. O. S. KELLEY
COMPANY.**

FILED MARCH 18, 1896. No. 6353.

1. **Partnership: JOINT OWNERSHIP OF THRESHING-MACHINE:**
EVIDENCE. Evidence that two farmers purchased a threshing-machine, paid for the same with their joint

47	678
49	242
51	97
47	678
56	487

State Bank of Lushton v. Kelley.

and several notes secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing-machine was partnership property, nor that a copartnership relation existed between the farmers. Such evidence warrants rather the conclusion that the farmers were joint owners or tenants in common of the machine.

2. **Chattel Mortgages: FAILURE TO REGISTER: SUBSEQUENT LIENS: REPLEVIN.** In such case the machine company neglected to file its mortgage or a copy thereof in the county where the farmers resided. Subsequently one of the farmers mortgaged the machine to a bank to secure a pre-existing debt which he owed it. The bank had no knowledge of the mortgage of the machine company, took possession of the machine under its chattel mortgage, and the machine company replevied it. *Held*, (1) That the mortgage made by the farmer invested the bank with a lien on whatever interest he had in the machine; (2) that the bank was a mortgagee in good faith within the meaning of section 14, chapter 32, Compiled Statutes.
3. ———: ———: ———. A mortgagee in good faith, within the meaning of section 14, chapter 32, Compiled Statutes, is one who takes his mortgage to secure a debt actually and justly owing to him, without notice, actual or constructive, of other existing claims against the mortgaged property.

ERROR from the district court of York county.
Tried below before BATES, J.

George B. France, for plaintiff in error.

Sedgwick & Power, contra.

RAGAN, C.

On the 8th day of May, 1891, Peter Peters and John Peters, by their order or contract in writing, purchased a threshing-machine of the O. S. Kelley Company. The machine was to be delivered to them not later than the 20th of July of that year and they were to pay for the same \$585. Part of

this payment was to be made in cash on delivery of the machine and the remainder to be evidenced by their notes, secured by a chattel mortgage on the machine. The machine was delivered on the 23d of July, cash payment made, and John and Peter executed their joint and several promissory notes to the Kelley Company for the remainder of the purchase price of the machine, and at the same time executed to the Kelley Company a chattel mortgage on the machine to secure the payment of their notes. By mistake this mortgage was filed in the office of the county clerk of York county, although the mortgagors resided in Hamilton county. On the 13th day of October, 1891, Peter Peters mortgaged the threshing-machine to the State Bank of Lushton to secure a debt which he then, and had for some time, owed the bank. The bank subsequently took possession of the threshing-machine under its chattel mortgage and was proceeding to foreclose the same when the Kelley Company, by this action, replevied the threshing-machine from the bank. The action was tried to a jury in the district court of York county, a verdict and judgment rendered for the Kelley Company, and the bank prosecutes to this court a petition in error.

1. On the trial the district court, at the request of the Kelley Company, instructed the jury as follows: "The jury are instructed that the law is that partnership effects cannot be released from liability for the unpaid debts of the partnership without the consent of every member of the firm. The corpus of partnership effects is joint property and neither partner separately has anything in that corpus; but the interest of each is only his share of what remains after the partnership ac-

counts are taken. In this case, if you believe from the evidence that Peter Peters and John Peters purchased of the plaintiff in this case the power and separator described in the plaintiff's petition, in partnership, to be used and operated by them in threshing; and as a part of the transaction the said Peter Peters and John Peters executed and delivered to the plaintiff the notes and mortgage described in the petition and put in evidence by the plaintiff in this case, to secure the payment of the purchase price of the said outfit, then the plaintiff in this case would have the first lien upon the property in question to the amount unpaid upon said mortgage, and the said Peter Peters would have no right to execute a mortgage upon the said threshing outfit to secure his individual indebtedness, to the prejudice of the plaintiff in this case; and any mortgage so given by the said Peter Peters to secure his individual indebtedness would be subject to the mortgage of this plaintiff, regardless of whether plaintiff's mortgage was ever filed in the office of the clerk of the county or not." The first assignment of error argued is directed to the giving of this instruction. The evidence shows that John and Peter Peters were farmers and brothers residing in Hamilton county at the time they purchased the threshing-machine and executed the notes and mortgage to the Kelley Company; that Peter Peters and a son of John Peters accompanied the machine from place to place and used it in threshing grain. Whatever may be said of this instruction as an abstract proposition of law, we think it had no place in this case. It submitted to the jury the question as to whether John and Peter were co-partners, and there is no evidence what-

ever in the record which would justify the jury in making such a finding. Counsel for the defendant in error assume that because John and Peter jointly purchased and jointly owned this property, that therefore a partnership relation existed between them; but such a result by no means follows. They were rather joint owners or tenants in common, so far as the record shows, of the property. In *Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84, it was held, following the definition given by Chancellor Kent, that "Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions;" and in *Iloff v. Brazill*, 27 Ia., 131, it was held: "Where two farmers buy in common a threshing-machine, which they use and operate together, and for which they execute to the vendor a note, signed by both individually, they are to be treated as joint owners and not as partners." In *Quackenbush v. Sawyer*, 54 Cal., 439, it was held that "a mere joint ownership in personal property does not constitute a partnership." To the same effect see *Wheeler v. Farmer*, 38 Cal., 203; *Hawes v. Tillinghast*, 67 Mass., 289; *Goell v. Morse*, 126 Mass., 480; *Moore v. Curry*, 106 Mass., 409; *Vose v. Singer*, 86 Mass., 226; *Donnan v. Gross*, 3 Ill. App., 409; *Sargent v. Downey*, 45 Wis., 498; *Cinnamond v. Greenlee*, 10 Mo., 578; *Ward v. Bode-man*, 1 Mo. App., 272; *Runnels v. Moffat*, 41 N. W. Rep. [Mich.], 224. We do not say that John and Peter were not partners, nor that the threshing-machine was not partnership property, but what we do decide is that the mere fact that they jointly purchased, owned, and operated the

threshing-machine does not establish that a co-partnership existed between the joint owners, nor that the threshing-machine was copartnership property. So far as the record before us goes, John and Peter were joint owners—tenants in common—of the threshing-machine, and the bank acquired a lien upon the interest of Peter Peters in the threshing-machine by virtue of the mortgage he made thereon.

2. The court, on its own motion, also instructed the jury as follows: "If you find from the evidence that the cashier or assistant cashier of the defendant, the State Bank of Lushton, had actual notice or knowledge of plaintiff's mortgage upon the threshing-machine and power in controversy at the time or prior thereto of taking the mortgage of Peter Peters in favor of such bank upon such machinery, then such bank is not a mortgagee in good faith and your verdict should be for the plaintiff." The second assignment of error argued is directed to the giving of this instruction. Counsel for plaintiff in error says, and correctly says, that the instruction was wrong because there was no evidence in the record which justified its being given. The only evidence in the record which tends to show, if that does, that the bank officers had any knowledge or notice of the mortgage held by the Kelley Company is this: The bank was a subscriber for a "bulletin" issued by someone in York county, which bulletin gave the names of parties making mortgages filed in York county and a description of the mortgaged property. It was shown that a bulletin which came to the bank soon after July 23, 1891, recited that John and Peter Peters had executed a chattel mortgage to the Kelley Com-

pany on a threshing-machine, such as the one in controversy, and that this mortgage had been filed in the clerk's office of York county, but there is no evidence in the record that any officer or agent of the bank ever read this bulletin. If the jury had specially found that the officers of the bank had actual knowledge or notice of the mortgage of the Kelley Company, the evidence would not have supported the finding, and the court therefore erred in giving the instruction.

3. But it is insisted by the defendant in error that the judgment rendered was the only one which could have been correctly rendered under the facts in evidence in the case; and that, therefore, all errors in the record are without prejudice to the plaintiff in error. This contention rests upon the fact that the undisputed evidence shows that the mortgage made to the bank by Peter Peters on the threshing-machine was made to secure a then pre-existing debt, and that, therefore, the bank is not a mortgagee in good faith, within the meaning of section 14, chapter 32, Compiled Statutes, which declares that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides," etc. It is not pretended but that John and Peter Peters retained possession of the threshing-

machine after they mortgaged it to the Kelley Company; nor that this mortgage, or any copy of it, was ever filed in the office of the county clerk of Hamilton county, where the mortgagors resided, nor that Peter Peters was not justly indebted to the bank. The sole contention is that a mortgagee of chattels to secure a pre-existing debt is not a mortgagee in good faith. To sustain this contention counsel cite us to *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863. In that case it was correctly held that "when goods obtained by fraud have been mortgaged by the fraudulent vendee solely to secure a pre-existing debt due from him to the mortgagee, the latter cannot claim the protection which the law affords an innocent and *bona fide* purchaser of property from a fraudulent vendee;" but in that case the mortgagor had obtained possession of the property which he mortgaged by fraud; the title as between him and his vendor had never passed. By making the mortgage to the Chadron bank the bank acquired only a lien upon such interest as its mortgagor had, and that interest was nothing, and therefore the bank acquired nothing. In the case at bar, however, the title and possession of the threshing-machine without fraud passed and vested in John and Peter, and the bank acquired by the latter's mortgage a lien on whatever interest Peter had in the threshing-machine. A mortgagee in good faith, within the meaning of the statute quoted, is one who takes his mortgage to secure a debt actually and justly owing to him, without any notice, actual or constructive, of other existing claims against the mortgaged property. The case cited to sustain the argument of counsel for the plaintiff in error is not in point.

Malm v. Thelin.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

Post, C. J., not sitting.

CHARLES E. MALM V. MARY THELIN.

FILED MARCH 18, 1896. No. 6109.

- 47 686

47 890

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51 530

47 686

57 147
1. Witnesses: OBJECTION TO ANSWER: WAIVER. Where a question is asked a witness, in itself proper and not open to objection, the adverse party does not waive his right to object to an answer to such question containing inadmissible matter by not having objected to the question itself.

2. ———: ———: MOTION TO STRIKE: REVIEW. In such case the admissibility of testimony contained in the answer is properly presented for review by a motion to strike out the answer and an exception to an order overruling such motion.

3. Master and Servant: RISKS OF EMPLOYMENT. A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objection as to the hazards. *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, followed.

4. ———: ———: BURDEN OF PROOF. The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule.

5. ———: ———: PLEADING. In his petition he must plead the existence of the facts creating such exception.

6. ———: ———: ———: EVIDENCE. Evidence tending to

Malm v. Thelin.

show that defective machinery was used under a promise by the master to remove the defect, *held* inadmissible where such promise had not been pleaded.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

John P. Breen, for plaintiff in error.

Gustave Anderson and C. P. Halligan, contra.

IRVINE, C.

The defendant in error brought this action against the plaintiff in error to recover on account of injuries sustained by defendant in error in operating machinery while in the employ of the plaintiff in error, a laundryman. She recovered judgment for \$2,500. For convenience the parties will be referred to as plaintiff and defendant as their positions were in the district court. The petition, after alleging that the defendant was the owner of and operated a laundry in Omaha, and that the plaintiff was his servant in the operation thereof, alleged that there was in the laundry a certain machine called a mangle, which was on June 27, 1890, incomplete, imperfect, unsafe, and wholly unfit for use in that it had no guard or protection for the fingers or hands at the point where the clothes were received into the machine; that the defendant well knew of the defect in the machine but negligently used and operated said machine and directed the plaintiff to operate the same; that on said 27th of June, while plaintiff was using said machine as directed by the defendant, she had three fingers of her left hand cut and bruised by said machine so that amputation was necessary; "that said in-

jury was caused by or through no fault or negligence on the part of said plaintiff, but because and solely on account of the incompleteness of said machine and the want of the aforesaid guard or protection on said machine, and the recklessness, carelessness, and negligence on the part of said defendant for ordering or directing this plaintiff to work with said machine while said machine was in the condition hereinbefore set forth." The answer admits that defendant owned and operated the laundry in question and that plaintiff was his servant; that he kept a mangle in said laundry; that plaintiff was injured therein; and denied all other allegations of the petition. An accord and satisfaction were also pleaded, but it will not be necessary at this time to notice this defense. It will be observed that the petition does not charge that plaintiff was inexperienced, that she was not aware of the defect in the machine, and it is not charged that she used it relying on the promise of the defendant to repair the defect. The evidence, without contradiction, shows that before plaintiff was directed to use the machine, attention was especially called to the defect, and that she was aware thereof.

At this point in plaintiff's testimony, the following occurred:

You may state whether or not he [the defendant] said anything to you in regard to using the mangle?

A. Yes, the first day we was using the mangle he said, "We will get that guard as soon as we can."

Mr. Breen: What is that answer?

A. He will get that guard as soon as he can get it.

Defendant objects to the last answer, and moves that it be stricken out, on the ground that there is no such issue in the pleadings as a promise to repair the defect in this machine. Motion overruled, to which defendant excepts.

The overruling of this motion is assigned as error. In considering this assignment the question first arises whether, under the circumstances, the question having been answered without objection, the overruling of a motion to strike out the testimony is open to review. It has been several times held that where a question is answered without objection, objections to the evidence are waived and cannot thereafter be presented by a motion to strike out the evidence so admitted. (*Palmer v. Witcherly*, 15 Neb., 98; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1; *Brown v. Cleveland*, 44 Neb., 239.) In all of these cases, however, it either affirmatively appears from the report, or it is a fair presumption from the facts stated, that the questions which elicited the objectionable evidence were of such a character that objections interposed thereto before the questions were answered would have prevented the admission of the evidence. Where the objectionable matter appears in an answer not properly responsive to a question, the rule must be different. This distinction was indicated in *Gran v. Houston*, 45 Neb., 813. In *Kissinger v. Staley*, 44 Neb., 783, it was held that if the evidence was recited in a narrative form or volunteered by the witness, or if it was not responsive to a question asked, a motion to strike out must be made in order to present anything for review. The reason is that where the evidence is given

in narrative form, or volunteered by the witness, or appears in an answer not responsive to the question propounded, no opportunity exists for objecting before the evidence is elicited, as no question has been asked sufficient to apprise the court or counsel that such evidence is about to be adduced. The same reasons exist and the same rule should apply where a question has been asked, in itself proper and not open to objection, and the witness in answer thereto states something which is objectionable, although it may be fairly responsive to the question. Now the question asked in this case was whether or not the defendant said anything in regard to using the mangle. This question, strictly speaking, called only for a categorical answer upon which further questions might be founded; but assuming that it called for a specific answer as to what was said, the question was not in itself open to objection. The plaintiff pleaded that she had been commanded by defendant to operate the machine; and in view of this pleading the question seemed to call for that command, and an objection urged to it would have been properly overruled. Instead of that the witness answered that the defendant said that he would get the guard as soon as he could. This answer was evidently not heard, and counsel asked to have it repeated, and then moved to strike it out, because irrelevant under the pleadings. Under the circumstances, we think that defendant availed himself of the first opportunity to object to evidence of this character, and that his motion to strike out the answer raises the question of the admissibility of the evidence of a promise on the part of defendant to remove the defect in the machine. A

servant assumes the risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556.) In this state this rule has been modified to this extent that where the servant in obedience to the requirements of his master incurs the risk of machinery or appliances which, although dangerous, are of such a character that they may be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318; *Dehning v. Detroit Bridge & Iron Works*, *supra*.) Therefore, the presumption is that a servant employing machinery obviously defective has assumed the risk occasioned by the use of such machinery, and in order to recover he must rebut that presumption, and in order to rebut it he must not only prove, but he must plead, the facts which create an exception to the rule,—as, for instance, that, on complaint to the master, a promise was made to remove the defect and the machinery was used relying upon that promise. In *Missouri P. R. Co. v. Baxter*, *supra*, a judgment was reversed because the petition did not plead such exceptions, and in *Dehning v. Detroit Bridge & Iron Works*, *supra*, an amendment had been required in a similar case

before the plaintiff was permitted to introduce evidence of such exceptions. The following cases also hold that in order for the plaintiff to avail himself of such exceptions, they must be specially pleaded: *Bogenschutz v. Smith*, 84 Ky., 330; *International & G. N. R. Co. v. Doyle*, 49 Tex., 190; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind., 265; *Hayden v. Smithville Mfg. Co.*, 29 Conn., 548; *Stephenson v. Duncan*, 73 Wis., 404; *Coal & Car Co. v. Norman*, 49 O. St., 598. In this case the plaintiff, without pleading the particular exception to the general rule referred to, was permitted, over objections, to introduce evidence of the existence of that exception. This was erroneous, and particularly prejudicial, because it was neither pleaded nor proved that the defect was not obvious, that the plaintiff was inexperienced, or that other circumstances existed except the one referred to which would permit a recovery, and the case finally rested largely on the fact of this promise. The judgment must be reversed and the cause remanded, with directions to the district court to permit the plaintiff, if she so desires, to amend her petition.

REVERSED AND REMANDED.

JAMES E. MURPHEY V. MARIA VIRGIN.

FILED MARCH 18, 1896. No. 6211.

1. **Action to Recover Money Forcibly Taken from Debtor:**
VERDICT FOR PLAINTIFF. Evidence examined, and held to sustain the verdict.
2. **Pleading: INSTRUCTIONS: STATEMENT OF ISSUES.** Where

47	692
48	817
47	692
53	624
55	93
55	394
47	692
56	500

Murphey v. Virgin.

pleadings contain matters of evidence rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded, and disregarding such evidentiary facts.

3. **Witnesses: EVIDENCE: JURY.** A jury is not bound to blindly accept as true all testimony which is not directly contradicted or impeached. The testimony of a witness should be weighed in connection with all the facts in the case. Instructions substantially to that effect are not erroneous.
4. **Trover and Conversion: RECOVERY OF MONEY FORCIBLY TAKEN FROM DEBTOR.** Money taken forcibly and without the consent of the owner may be recovered back; and the fact that the owner was indebted to the wrongdoer in an amount as great as the sum taken is no defense.
5. **Instructions: EVIDENCE.** It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence.

ERROR from the district court of Seward county. Tried below before WHEELER, J.

George B. France, for plaintiff in error.

References: *Mathewson v. Burr*, 6 Neb., 312; *Commings v. Winters*, 19 Neb., 720; *Holland v. Griffith*, 13 Neb., 472; *Sandwich Mfg. Co. v. Feary*, 22 Neb., 53; *Hiatt v. Kinkaid*, 28 Neb., 721; *Galloway v. Hicks*, 26 Neb., 532; *City Bank of Macon v. Kent*, 57 Ga., 283; *Smith v. Grimes*, 43 Ia., 356; *Rockford R. Co. v. Coultars*, 67 Ill., 398; *Lincoln v. Holms*, 20 Neb., 39; *Campbell v. Holland*, 22 Neb., 587; *Parsons v. Hughes*, 9 Paige [N. Y.], 591; *Adams v. Sage*, 28 N. Y., 103; *Baker v. Spencer*, 47 N. Y., 562; *Pearson v. Chapin*, 44 Pa. St., 9; *Firemans Ins. Co. v. Cochran*, 27 Ala., 228.

D. C. McKillip, contra.

References: *Norwegian Plow Co. v. Haines*, 21 Neb., 691; *Atchison & N. R. Co. v. Washburn*, 5 Neb.,

124; *McKyring v. Bull*, 16 N. Y., 302; *Cooley, Torts*, 505; *Bradley v. Chase*, 22 Me., 511; *Negley v. Lindsay*, 67 Pa. St., 217; *Obernalte v. Edgar*, 28 Neb., 70; *Schribar v. Platt*, 19 Neb., 628.

IRVINE, C.

The defendant in error was the plaintiff in the district court, and in her petition charged that Murphey, on or about August 3, 1889, assaulted her and took from her possession gold and silver coin of the amount and value of \$463,—her money,—and converted the same to his own use. The defense set up was that Murphey had been a surety on the official bond of Alexander Virgin, plaintiff's husband, as treasurer of a school district; that judgment was recovered on the bond for \$1,292, and that Murphey, by virtue of said judgment and at the request of Mrs. Virgin, paid upon said judgment, and for other expenses in connection with Mr. Virgin's default, \$466.08; that Virgin had been the owner of certain land, which, without consideration, he conveyed to Mrs. Virgin, who held the title in trust for him; that Mr. and Mrs. Virgin agreed, in consideration of Murphey's paying the money referred to, upon the sale of said land to apply its proceeds to the repayment of Murphey; that on August 3, 1889, Mr. and Mrs. Virgin sold said land and out of the money received paid to Murphey said sum of \$466.08, being the money here sued for, and took and received from Murphey a receipt acknowledging the payment of the same in full satisfaction of Murphey's claims aforesaid. The plaintiff recovered judgment.

The first assignment of error argued is that the verdict is not sustained by the evidence. Accord-

ing to Mrs. Virgin's testimony, when the sale of the land was consummated she met the purchaser in the office of a third person, and he paid to her the money in coin. Murphey was present and Mrs. Virgin offered to pay him \$25, which she said she owed him. She had placed the rest of the money in a reticule. Murphey declared he would have the whole of it, and forcibly took it from the reticule, at the same time threatening Mrs. Virgin with a revolver. It may be here remarked that there is no evidence in the record in support of the averment that the land belonged to Mr. Virgin, although it clearly appears that there was an indebtedness to the amount claimed from Mr. Virgin to Murphey on account of the judgment upon the bond and expenses of litigation. This would seem to quite thoroughly establish the plaintiff's *prima facie* case. Most of Mrs. Virgin's testimony was contradicted by other witnesses, but it was for the jury and not for this court to determine who was most worthy of belief. Murphey does not directly deny that the money was taken against Mrs. Virgin's consent, although he denies he used force. His defense is based chiefly on testimony from several witnesses, to the effect that after the transaction in the office Mrs. Virgin went voluntarily to Murphey's house and paid to him \$6.07, being the difference between the money which he obtained in the office and the amount due him from Virgin, and insisted upon taking a receipt from him acknowledging satisfaction of the whole claim. This receipt was not produced, Mrs. Virgin emphatically denying that she had ever obtained it, but was proved by a letterpress copy bearing no signature. There is also testimony to the effect that Mrs. Virgin had said to

Murphey v. Virgin.

third persons that she had so paid Murphey's claim. Most of this testimony is denied by Mrs. Virgin, although she admits going from the office to Murphey's house for the purpose of giving Mrs. Murphey "a piece of her mind," and that she there gave Murphey a dollar. She says she was much excited, and did this, saying that as he had taken the remainder he might as well have the whole of it. We think there was enough to sustain the verdict. There was certainly sufficient to establish a *prima facie* case, and the burden of proving what counsel term "a ratification" was upon Murphey. While his evidence in that behalf was not met by the clearest and most satisfactory proof to the contrary, we think it was fairly within the province of the jury to say whether his defense had been established.

Certain rulings on the evidence cannot be considered, for the reason that in the petition in error there are no assignments specifying such rulings.

The remaining assignments relate to the instructions. It is claimed that the second instruction, which stated the defense, was erroneous because not complete. The instruction was as follows: "For answer the defendant alleges that on and prior to the 3d day of August, 1889, the plaintiff and her husband, Alexander C. Virgin, were indebted to him in the sum of \$466.08, and that on the said 3d day of August, 1889, the plaintiff and said Alexander paid and delivered to the defendant the sum of \$466.08, being the sum of money due the defendant from the plaintiff; and for further answer the defendant denies each and every other allegation contained in plaintiff's petition." It is argued that the court should have instructed the jury specifically, as

alleged in the answer, that defendant claimed the money because it had been derived from land sold which the plaintiff and her husband agreed should be applied upon the debt. We think this was unnecessary. The instruction given states in concise language the legal effect of the answer. The manner in which the money was obtained, the manner in which the alleged indebtedness arose, and the manner of payment were matters of evidence rather than of pleading.

The fourth instruction was as follows: "You are the judges of the credibility of the witnesses and of the weight to be attached to each and all of them, and you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matter testified to by him, or that for any other reason his testimony is untrue or unreliable." This instruction is complained of because of the statement that the jury was not bound to take the testimony of any witness as absolutely true, it being argued that the jury is compelled to believe a witness where not contradicted or impeached. We think the whole instruction, in connection with the fifth, which is the usual instruction in regard to considering the interest, bias, demeanor, and intelligence of witnesses, states the law correctly. A fair construction of the court's language would not authorize the jury to arbitrarily and unreasonably disregard uncontradicted testimony from an honest, unbiased, intelligent, and apparently truthful witness. The instruction does, however, tell the jury that they need not blindly accept testimony, but should weigh it in connection with all the facts

and circumstances in evidence, and give it such credence as under all the proof is warranted. This is correct. Other instructions are complained of as unfairly repeating the theory of the plaintiff. Without quoting them, we will merely say that we do not think they are in any degree open to that criticism.

The first instruction requested by the defendant was to the effect that even if Murphey's act in getting the money was wrongful, still, if afterwards the plaintiff paid the balance due him and demanded and obtained a receipt therefor, such acts would be a ratification. We think the principle of this instruction was covered by the court's sixth, which was that if the defendant forcibly and without the consent of plaintiff took the money, and the plaintiff afterwards, with full knowledge of the material facts, voluntarily consented to defendant's retaining such money as a settlement of an existing debt against her and her husband, then there would be a ratification. The court's instruction was in this respect fully as advantageous to the plaintiff as the one requested, and was a more accurate statement of the law. The ratification would arise, as stated by the court, from plaintiff's consenting that the money taken should be so retained. The payment of the balance and taking a receipt, elements embodied in the instruction requested, would merely be evidence of such consent.

The second instruction requested, while somewhat involved in its language, was in effect that if the money was due Murphey, plaintiff could not recover, although it was taken against her consent. This doctrine could not for a minute be tolerated. A man has no right to resort to robbery to collect his claims.

The third instruction requested was correctly refused, because it told the jury that the failure of the plaintiff to make a demand for the money was a "strong circumstance that she considered the receipt of the sum by the defendant as a payment." It was not error to refuse to instruct the jury as to the weight to be given different portions of the evidence. It was for the jury to determine how strong the circumstance was.

The remaining instructions requested were on the subject of ratification and were covered by the court's sixth.

JUDGMENT AFFIRMED.

**SAMUEL GARBER V. PALMER, BLANCHARD &
COMPANY.**

FILED MARCH 18, 1896. No. 6350.

1. Replevin: DISMISSAL. A plaintiff in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action.

2. ———: RIGHT OF DEFENDANT TO TRIAL: DAMAGES. When a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, the defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages.

ERROR from the district court of Webster county. Tried below before BEALL, J.

The issues are stated by the commissioner.

47	699
48	603
47	699
49	749
50	335
50	508
50	797
51	105
52	631
54	513
55	461
47	699
56	200
56	744

James McNeny, for plaintiff in error:

The order of the court sustaining the motion of defendant in error to dismiss this cause was erroneous. In an action of replevin both parties are actors. On the plaintiff's failure to prosecute, the defendant becomes the real plaintiff in the action. (*Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Wilson v. Wheeler*, 6 How. Pr. [N. Y.], 49; *Broom v. Fox*, 2 Yeates [Pa.], 530; *Long v. Buckeridge*, 1 Str. [Eng.], 106; *Marshall v. Bunker*, 40 Ia., 121; *Wells*, Replevin, 195; *Jewell v. Lamereaux*, 30 Mich., 155; *Reed v. Carpenter*, 2 O. 79; *Ahlman v. Meyer*, 19 Neb., 63; *Dahler v. Steele*, 1 Mont., 206; *Berghoff v. Heckwolf*, 26 Mo., 512; *Kennedy v. Beck*, 15 Kan., 555; *Ranney v. Thomas*, 45 Mo., 112; *Dowling v. Pollock*, 18 Cal., 625; *Mikesill v. Chaney*, 6 Porter [Ind.], 52; *Leese v. Sherwood*, 21 Cal., 151.)

No appearance for defendant in error.

IRVINE, C.

This was an action in replevin by Palmer, Blanchard & Co., a corporation, against Garber for 300 head of cattle alleged to be worth \$8,000, and appraised at \$5,000. The answer was a general denial. After each side had rested its case the plaintiff moved the court "to dismiss this action without liability to the defendant herein." Whereupon the following order was made: "On consideration whereof the court sustains said motion, and it is hereby considered, ordered, and adjudged that said action be, and the same is hereby, dismissed at plaintiff's costs. And it is further considered and adjudged that said plaintiff-

iff be, and he is hereby, discharged from all liability to defendant herein. Defendant thereupon asks that the cause as to him be submitted to the jury upon the evidence and the instructions submitted to the court. On consideration whereof the court refuses to grant said application. And the court further refuses to grant any other motion or application on the part of the defendant, and refuses to make or render any other ruling, finding, or judgment save and except the above." It appears, not from the record proper, but from the bill of exceptions, that the property had been delivered to the plaintiff under the writ.

The evidence discloses that Garber and one Higby, who was cashier of the Farmers & Merchants Banking Company of Red Cloud, made an arrangement with Palmer, Blanchard & Co., who were live stock commission men at South Omaha, whereby the Farmers & Merchants Bank issued a letter of credit in favor of Garber, on the faith of which Garber bought the cattle in controversy in New Mexico, drawing on the bank for the purchase price. The agreement was that the South Omaha National Bank should issue to the Farmers & Merchants Bank a corresponding letter of credit; that Garber should secure advances by Palmer, Blanchard & Co. by chattel mortgage; that the Farmers & Merchants Bank should, in pursuance of its letter of credit, honor Garber's drafts for the purchase money, and that on the execution of the mortgages, drafts should be drawn, with the mortgages attached, which should be paid by Palmer, Blanchard & Co. The details of the latter part of the agreement were not made clear, nor are they material. It sufficiently appears that through some arrangement

Garber v. Palmer.

then made, Palmer, Blanchard & Co. were, upon being secured by chattel mortgages executed by Garber, to pay the advances made by the Farmers & Merchants Bank to him. When the cattle arrived in Nebraska, Garber executed two mortgages, each of which covered 150 head of cattle; one for \$5,000, the other for \$2,435.17. These were delivered to the bank, together with notes representing the debt, and a draft was drawn on Palmer, Blanchard & Co. for the amount. Palmer, Blanchard & Co. refused to accept the draft, claiming that the mortgages should have covered certain hogs and corn in addition to the cattle. After Palmer, Blanchard & Co had refused to accept the draft Garber prepared to ship the cattle for sale to Kansas City, when this action was instituted. It is quite evident that officers of the bank instituted the action; but Mr. Blanchard, representing Palmer, Blanchard & Co., appeared on the scene the next morning, and joined in the replevin bond. On the trial he testified to the foregoing facts, and testified distinctly and positively that his company had refused to accept the mortgages, and that it had no interest in or claim upon the cattle. It was on this state of facts that the court, on plaintiff's motion, dismissed the action and forbade the defendant the privilege of proving his damages. That error was committed is self-evident, but there is the difficulty in stating reasons for reversal which always attends an attempt to demonstrate an axiom. The district court may have proceeded upon the theory that section 430 of the Code gives the plaintiff in every action a right to dismiss without prejudice at any time before final submission; but this provision does not apply to

actions of replevin. In replevin, where the property is delivered to the plaintiff, he practically obtains his execution before judgment. He accomplishes the main object of his suit through the preliminary process of the court. It is sometimes said that both parties then become actors. The plaintiff has taken the property, and the burden falls upon him of establishing his right thereto; and unless he recovers on the strength of his own title, the defendant is entitled to judgment for the return of the property or for its value. He can no more abandon the case than can a defendant in an action of trover. It is true that section 190 of the Code provides that where judgment is rendered against the plaintiff on demurrer, or if the plaintiff otherwise fail to prosecute to final judgment, the court shall impanel a jury to inquire into the right of property and right of possession of the defendant; and if the jury be satisfied that either was in the defendant, they shall assess such damages as may be right and proper; but this section is enacted for the purpose of an assessment of damages, such as a plaintiff is entitled to on default in ordinary actions. The defendant is entitled to judgment unless the plaintiff proves his own title. (*St. John v. Swanback*, 39 Neb., 841; *Jenkins v. Mitchell*, 40 Neb., 664; *Kavanaugh v. Brodball*, 40 Neb., 875; *Peterson v. Lodwick*, 44 Neb., 771; *Johannson v. Miller*, 45 Neb., 53.) In case the plaintiff, by failure of evidence, or by failure to prosecute his case, fails to establish such affirmative right in himself the defendant is entitled to the procedure accorded by section 190, not for the purpose of establishing his right, but for the purpose of assessing his damages. It follows from the

nature of this action, and from the feature of the plaintiff's securing the property before he has established his right, that he cannot by a dismissal of the action avoid the necessity of making the necessary proof. He cannot by his own *ex parte* affidavit obtain property in the possession of another and then by dismissal leave the other party without an opportunity to defend his right and without a remedy. The proposition is so evident, the contrary so unjust, so absurd, and so preposterous, that neither argument nor authority should be necessary. Still the question has been several times decided by this court. (*Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Ahlman v. Meyer*, 19 Neb., 63.)

The action taken by the court might have been error without prejudice had the plaintiff beyond contradiction established its right; but it did not do so. In the first place the petition stated no cause of action. It alleged a special ownership in the property without setting out the facts in relation thereto. A plaintiff in replevin claiming under a chattel mortgage must allege a special ownership and plead the facts. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319.) In the second place, the plaintiff absolutely failed to prove ownership, general or special, or right of possession; but, on the contrary, its own evidence was that it had no claim at all, and had refused to accept the mortgages under which alone there was any pretense of a claim. Possibly the district court thought that the evidence showed that the suit had not been authorized by Palmer, Blanchard & Co., and that that

company was not, therefore, the actual plaintiff; but such evidence as was introduced to this effect was not in support of any pleading by Palmer, Blanchard & Co. of such facts; it was not relevant under the issues, except as it might operate in favor of the defendant, and was no ground for dismissing the case without a judgment for defendant. Finally, the evidence showed that while the suit had been begun without authority, Palmer, Blanchard & Co. had certainly ratified the acts of the person commencing it. Blanchard signed the replevin bond. Several continuances were taken on Palmer, Blanchard & Co.'s motion. Palmer, Blanchard & Co. prosecuted the action so far as it was prosecuted. It appears that after the cattle had been taken under the writ they were shipped to Palmer, Blanchard & Co. for sale. They were sold by that company and the proceeds remitted to Higby, who had assumed the indebtedness in favor of the Farmers & Merchants Bank, created by the transaction; but this merely shows that Palmer, Blanchard & Co. ratified the suit, and prosecuted it without a shadow of a claim of right, not for their own protection, but in order to protect Higby, it being explained in the evidence that this course was taken in order to prevent creditors of Garber from reaching the cattle. In brief, the transaction was in consummation of a conspiracy between Higby and Palmer, Blanchard & Co. to seize the cattle without any right thereto and without tangible claim of right, knowing they had no such right, for the purpose of in that way securing payment of a debt of Garber. An inexcusable error was committed. Possibly no party to the case has suffered greatly because the

proceeds of the property were applied to the payment of a debt of Garber's; but it is not in such a manner that a creditor can be permitted to obtain a preference.

REVERSED AND REMANDED.

47	706
54	152

47	706
58	636

47	706
59	188

IRWIN STALL, APPELLEE, V. CLAUDIUS JONES ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6282.

1. **Mortgages in Form of Absolute Deeds: EVIDENCE: REVIEW.** While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while this court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason and consistent in its different parts.
2. **Statute of Limitations: DEEDS AS MORTGAGES.** The statute of limitations runs against a bill to declare a deed absolute in form a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title.
3. **Adverse Possession: EVIDENCE.** That grantee's possession is adverse may be inferred from the exercise by him of acts of ownership after payment of the debt.
4. **Deeds as Mortgages: TITLE.** In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage.
5. ———: **FORECLOSURE: SETTLEMENT.** Therefore, where the grantee under such a deed is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting.

APPEAL from the district court of Seward county. Heard below before WHEELER, J.

The facts are stated in the opinion.

Reese & Gilkeson and *D. C. McKillip*, for appellants:

More than the mere preponderance of evidence is necessary to establish the claim that a deed absolute on its face is a mortgage. (*Cadman v. Peter*, 6 Sup. Ct. Rep. [U. S.], 957; *Tilden v. Streeter*, 8 N. W. Rep. [Mich.], 502; *Howland v. Blake*, 97 U. S., 624; *Woodworth v. Carman*, 43 Ia., 504; *Walker v. Farmers Bank*, 14 Atl. Rep. [Del.], 819; *Satterfield v. Malone*, 35 Fed. Rep., 451; *Lance's Appeal*, 4 Atl. Rep. [Pa.], 375; *Maher v. Farwell*, 97 Ill., 56; *Pancake v. Cauffman*, 7 Atl. Rep. [Pa.], 67; *Luver v. Lyons*, 40 Ia., 510; *Butler v. Butler*, 1 N. W. Rep. [Wis.], 70; *Schade v. Bessinger*, 3 Neb., 144; *Derooin v. Jennings*, 4 Neb., 97; *Ford v. Joyce*, 78 N. Y., 618; *Boardman v. Davidson*, 7 Abb. Pr., n. s. [N. Y.], 439; *Jasper v. Hazen*, 58 N. W. Rep. [N. Dak.], 457.)

The action is barred. (*Morrow v. Jones*, 41 Neb., 867; *Borden v. Clow*, 30 Pac. Rep. [Nev.], 821; *Fisk v. Stewart*, 26 Minn., 372; *Rogers v. Benton*, 38 N. W. Rep. [Minn.], 768.)

Reference was also made to the following cases: *Knowles v. Knowles*, 86 Ill., 6; *Kent v. Lasley*, 24 Wis., 654; *Moreland v. Barnhart*, 44 Tex., 275; *Glisson v. Hill*, 2 Jones Eq. [N. Car.], 256; *Todd v. Campbell*, 32 Pa. St., 250; *Sloan v. Becker*, 26 N. W. Rep. [Minn.], 730; *Cooper v. Skeel*, 14 Ia., 578; *Noel v. Noel*, 1 Ia., 423.

Pound & Burr, R. P. Anderson, George H. Terwilliger, and Thomas A. Healey, contra.

References to question as to the quantity of proof required: *Southard v. Curley*, 134 N. Y., 148; *Newman v. Edwards*, 22 Neb., 248; *Price v. Karnes*, 59 Ill., 276; *Littlewort v. Davis*, 50 Miss., 403; *Darst v. Murphy*, 119 Ill., 343; *Perdue v. Bell*, 83 Ala., 396; *Bailey v. Bailey*, 115 Ill., 551; *Gassert v. Bogk*, 7 Mont., 585; *Knapp v. Bailey*, 79 Me., 195; *Cosby v. Buchanan*, 81 Ala., 574; *McMillan v. Bissell*, 63 Mich., 66; *Wylie v. Charlton*, 43 Neb., 840; *Hoyt v. Schuyler*, 19 Neb., 652; *Snowden v. Tyler*, 21 Neb., 199; *Bowman v. Griffith*, 35 Neb., 361.

References to question as to statute of limitations: *Newman v. Edwards*, 22 Neb., 248; *Lebley v. Farmers Loan & Trust Co.*, 139 N. Y., 461; *Paschall v. Hinderer*, 28 O. St., 568; *Woodworth v. Carman*, 43 Ia., 504; *Odenbaugh v. Bradford*, 67 Pa. St., 96; *Darst v. Murphy*, 119 Ill., 343.

The following cases were also cited: *Worthington v. Worthington*, 32 Neb., 338; *Morse v. Raben*, 27 Neb., 145; *Newman v. Edwards*, 22 Neb., 248; *Douglas v. Moody*, 80 Ala., 61; *Russell v. Southard*, 12 How. [U. S.], 139; *Howe v. Powell*, 40 La. Ann., 309.

IRVINE, C.

In December, 1875, Stall conveyed to Jones the northwest quarter of section 22, township 10 north, of range 2 east, in Seward county. December 17, 1891, he instituted this action for the purpose of having the conveyance declared to have been a mortgage, for an accounting of the amount due thereon, and of the rents and profits of the land which had been in Jones' possession

ever since the conveyance. The answer of Jones admits the conveyance, but alleges that it was in pursuance of an absolute sale of the premises, pleads laches, the statute of limitations, and adverse possession. The district court found for the plaintiff and also made special findings, not necessary to here notice because they amounted to a general finding for plaintiff on the issues joined. The defendant Jones appeals, the other defendants not appearing to have any beneficial interest.

The case in its nature calls for a review of the evidence to ascertain whether it supports the findings of the district court; and the appellant insists that the rule in such cases is that a mere preponderance of the evidence is not sufficient to establish the plaintiff's case; that in order to show that a conveyance absolute in form was in legal effect a mortgage, the evidence must be free from doubt, or at least that it must be of a most clear and convincing character. This position is supported to a certain extent by *Schade v. Bessinger*, 3 Neb., 140, and *Deroin v. Jennings*, 4 Neb., 97. The rule stated in the latter case is that a court of equity will not declare a deed absolute in form a mortgage unless the proof is clear, consistent, and satisfactory that the object of the transaction was to create a security for the payment of money. On the other hand, it has been held in relation to similar statements with regard to the degree of evidence required to establish the good faith of a conveyance from husband to wife, that in all civil cases only a preponderance of the evidence is necessary (*Stevens v. Carson*, 30 Neb., 544), and likewise as to the establishment of a parol gift (*Wylie v. Charlton*, 43 Neb., 840). In the case last cited it was said that in determining

on which side the preponderance of evidence lay, the circumstances naturally casting suspicion upon testimony to establish a parol gift were proper for consideration, but that such circumstances did not create a different rule as to the degree of evidence required. We adhere to the doctrine of the two later cases, that only a preponderance of evidence is required to establish an issue in civil actions; and we also adhere to the settled doctrine of this court that it cannot in the exercise of its appellate jurisdiction undertake to weigh conflicting evidence, but will, where the evidence is conflicting, refuse to set aside the finding of the trial court. Still, we do not think that this rule requires that we should in all cases sustain a finding merely because a search through the record discloses here and there isolated statements of witnesses which, taken together and disregarding all the rest, would sustain the finding. It is necessary to regard the case made by the successful party to some extent as an entirety; and we think the rule stated in *Schade v. Bessinger* and *Derooin v. Jennings* a correct one, not at all conflicting with other cases, provided it be applied simply so far as to require that in such cases as we are considering the plaintiff, to prevail, must present consistent and satisfactory evidence, which, if believed, would be sufficient to establish his case. If on his side such evidence is presented, the mere fact that it is contradicted by defendant's witnesses would not prevent a recovery provided the trial court in weighing the testimony considered the evidence on behalf of plaintiff worthy of belief. But the plaintiff's proof, when taken by itself, ought to be reasonable and consistent with known facts. In the case before us it is possible

to accept a portion of the plaintiff's testimony, and a portion of defendant's, and thus gain sufficient to support the findings; but in order to do so it is necessary to believe the plaintiff in some points where he is contradicted by several witnesses, by his own conduct, and by the circumstances, and then to follow this by absolutely disbelieving and rejecting other portions of his testimony and accepting on these points testimony of the defendant contradicted by the plaintiff. A complete review of the 400 pages of evidence is impracticable and it would be unprofitable. We shall content ourselves by an attempt to summarize its most important features.

The plaintiff's testimony is that he bought the land in question in 1874. It was incumbered by a mortgage in favor of R. E. Moore, for \$500, bearing twelve per cent interest, and due in May, 1876. Stall became indebted to Jones to an amount of \$80 or over, and in the autumn of 1875, an execution having been issued on a judgment against him in favor of a third person, he made arrangements with Jones by which Jones agreed to advance him other money so as to make his indebtedness \$520. To secure this Stall executed the deed in question, being in form an absolute conveyance of the premises. Jones, on his part, according to Stall's testimony, agreed to discharge Moore's mortgage when it became due and to carry the debt at ten per cent. It is beyond dispute that an indebtedness of \$520 was created from Stall to Jones at about this time, and that Stall paid this from time to time so that it was entirely discharged in March, 1878. Jones was let into possession on the execution of the deed, and has ever since occupied the land by his ten-

ants. When Moore's mortgage came due he paid it. Stall also testifies that in 1877 he found a purchaser for the land at \$1,200, and consulted Jones in regard to its sale; but Jones advised him not to sell, saying that he, Jones, would take care of it and that Stall could realize more than he was then offered. Stall also testifies to a recognition by Jones in September, 1882, of Stall's ownership; but, even according to Stall's testimony, this was somewhat equivocal. It was to the effect that Stall met Jones in Seward, and "told him we had better make a sale of the land, as I would like to get a little money out of it, and he told me no, to let the land go till after election, then he told me it was all right, that I could do without the money and after election he would make it all right." There is no distinct evidence of any further transactions until 1889, when Stall testifies that he demanded a reconveyance and Jones wrote him a check for \$20, which he handed to him and said that was all he could do, and then rushed out. In cross-examination Stall says that he understood from what Jones said that that transaction ended the business. Stall took the check and used its proceeds. In 1890, according to Stall, he again besought Jones for a settlement, and Jones said the affair was too old to open up. To a certain extent Stall is corroborated by his wife in regard to the purpose of executing the deed; and he is in part corroborated by another witness in regard to the transaction of 1882. Jones squarely contradicts him in regard to all the essential features of the case. He says the \$520 loan was secured by chattel mortgage; and Stall admits that one or more chattel mortgages were executed to secure it. It may be stated that it appears quite clearly

that these mortgages were in themselves sufficient security. It is undisputed that Jones has made improvements on the land to the amount of at least \$3,000, although Stall swears that he had no knowledge that such improvements were made until shortly before the action was begun. The testimony of strangers is almost altogether corroborative of Jones.

If the case rested entirely upon the proof in respect to the original character of the transaction, without regard to the other circumstances, the findings might be sustained; but taking the plaintiff's own testimony concerning the whole course of the transaction, it is far from satisfactory. According to the plaintiff the land was worth \$1,600 at the time of the conveyance. The incumbrance, including the Moore mortgage, was but a little over \$1,000. By March, 1878, Stall, by direct payments, had discharged the \$520 indebtedness. This left only to be met the debt created on account of the Moore mortgage, of \$500 and interest. Stall testifies that during nearly the whole period the rental value of the land has been from \$300 to \$400 per annum. It is of course possible, but it is very highly improbable, that Stall, who is incidentally shown to have been in financial difficulties during at least a portion of this period, should have permitted Jones to remain in possession and in perception of the profits of this land for sixteen years before bringing suit, for thirteen years after the original indebtedness had been paid, and for at least ten years after the profits of the land should have discharged the Moore indebtedness. This delay cannot be accounted for by any recognition by Jones of Stall's rights, because, according to Stall himself, Jones

was on each occasion guarded and equivocal, and the language which he used could not have been such as to lull Stall into a sense of security. On the contrary, if the events occurred as Stall describes them, Jones' conduct would rather have caused uneasiness and doubt as to his good faith. The evidence shows that Stall lived about five miles from the land, and it is equally improbable that if he thought he had any interest therein he should have been all those years in ignorance of the fact that Jones was making valuable and extensive improvements thereon. In this investigation we disregard much testimony in regard to statements of Stall disavowing interest in the land, because Stall denies having made such statements; but we cannot disregard the fact that in 1890 Stall filed two petitions against Jones in the district court, under his oath, alleging that the conveyance had been made to Jones in trust and for the convenience of Stall, and without consideration, without any reference to an indebtedness or a mortgage.

But if we could sustain the finding as to the nature of the original transaction, we would be at once met by the issue raised on the plea of the statute of limitations. In *Morrow v. Jones*, 41 Neb., 867, it was held that as a rule the right to foreclose and the right to redeem are reciprocal, and that the right to redeem is barred when the right to foreclose would be. In some cases it is held that against a mortgagee in possession the statute runs against a bill to redeem from the payment of the debt. (*Stillwell v. Hamm*, 97 Mo., 579; *Knowlton v. Walker*, 13 Wis., 264.) But it is the more general doctrine that the statute begins to run from the time the mortgagee's possession be-

comes adverse; and that this does not occur while the mortgagor's rights are admitted. (*McPherson v. Hayward*, 81 Me., 329; *Waldo v. Rice*, 14 Wis., 310; *Robinson v. Fife*, 3 O. St., 551; *Fisk v. Stewart*, 26 Minn., 365; *Miner v. Beckman*, 50 N. Y., 337; *Hubbell v. Sibley*, 50 N. Y., 468.) Applying this rule to the present case, it is true it does not appear from the plaintiff's testimony that Jones expressly denied plaintiff's title prior to 1890; but if we are to believe plaintiff in regard to the rental value of the land, the whole indebtedness must have been discharged more than ten years before suit brought. During this period Jones continued to lease the land, to make improvements thereon, and generally treat it as his own. There was certainly enough to justify a finding that his possession had become adverse, although we do not say that the evidence compelled such finding. In order, however, to account in any reasonable manner for Jones' continued possession in subordination to Stall's rights, we must accept Stall's improbable testimony as to the facts surrounding the original transaction, and then disbelieve his testimony as to rental value of the property.

Finally, if we pursue the course indicated, we are confronted with the transaction of 1889, when Stall says Jones gave him a check for \$20 and told him that was all he would do, and Stall accepted the check and used its proceeds, understanding that Jones tendered it as a final settlement of the transaction. In the case of an ordinary mortgage, which under our law creates a lien and passes no title, it is reasonably clear that a right to redeem could not be barred by a transaction of this character lying entirely in parol; but in this state a deed absolute in form, although intended

as security, and in general treated as a mortgage, passes the legal title to the mortgagee. (*Gallagher v. Giddings*, 33 Neb., 222; *Harrington v. Birdsall*, 38 Neb., 176.) Where the legal title has passed, where the mortgagee is in possession, and where an arrangement is entered into which defeats the mortgagor's right to an accounting, we see no reason why it should not bar a redemption. Where a deed absolute in form is executed and a written defeasance or bond for reconveyance is given back, and the mortgagor voluntarily surrenders or cancels the defeasance or bond, this renders the conveyance absolute and vests complete title in the mortgagee. (*Trull v. Skinner*, 17 Pick. [Mass.], 213; *Harrison v. Trustees of Phillips Academy*, 12 Mass., 456; *Shubert v. Stanley*, 52 Ind., 46.) So where an absolute deed is given as security for the payment of money, the grantor may abandon the payment of the debt, cancel the secret agreement, and treat his conveyance as absolute; and if he do so, he will be bound by his election. (*Carpenter v. Carpenter*, 70 Ill., 457.) The Massachusetts cases go upon the ground that the mortgagor, by voluntarily destroying the evidence which would constitute the conveyance a mortgage, estops himself from thereafter claiming that it was a mortgage. So here, if Stall, knowing that the check was tendered him as a complete and final settlement of the account, accepted it and retained it, he bound himself by the accounting so had, and is without standing to maintain this bill for an accounting and redemption, because the accounting is essential to the redemption. It is true that Stall's account of the last transaction is contradicted by Jones and by other witnesses, who testify that it related to an entirely different

matter; but we repeat that we cannot zig-zag through the record, accept Stall's testimony on some points and entirely discredit it on others, believing the witnesses who contradict him, and so reach a conclusion that there was satisfactory evidence in support of the decree.

We hold that the findings are not supported by the evidence, not because we have weighed the conflicting evidence and believe that the trial court wrongfully passed upon the conflict, but because Stall's testimony and that offered in support thereof, when taken alone, does not present a consistent and reasonable state of facts entitling him to relief. We are not bound to accept isolated statements of witnesses as sufficient to make out a case, when they are inconsistent with one another, and not reasonably reconcilable with known and established facts.

REVERSED AND DISMISSED.

OAKLAND HOME INSURANCE COMPANY V. BANK
OF COMMERCE OF GRAND ISLAND.

47	717
58	507
158	508

FILED MARCH 18, 1896. No. 6363.

1. Insurance: OWNERSHIP OF PROPERTY: QUESTION FOR JURY.

In an action upon an insurance policy, one defense being that the insurer had parted with all interest in the insured property before the policy was issued, the question whether the insured was at the time the policy issued the owner of the property, was on conflicting evidence properly submitted to the jury. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537, followed.

2. Transfer of Property: ASSIGNMENT OF POLICY: RIGHTS OF MORTGAGEE. The policy was sued on by the Bank of

Oakland Home Ins. Co. v. Bank of Commerce.

Commerce, a mortgagee of the premises. It was issued to the owner, J., and contained provisions whereunder a transfer of the property, or an assignment of the policy without consent of the insurer, avoided the policy. Before the loss, J. had conveyed the premises to B., and assigned the policy to him. The insurer pleaded this conveyance and assignment without consent of the insurer, as a defense. Attached to the policy was the following: "Loss, if any, under this policy, payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." In the body of the policy was the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be written upon, attached or appended hereto." *Held*, (a) That these two clauses should be construed together; (b) that the clause in the body of the policy rendered conditions expressed in the policy applicable to the interest of a mortgagee having rights thereunder, only where there was written upon, attached or appended to the policy some provision or condition rendering such conditions of the policy applicable, and defining the manner of their applicability; (c) that the clause attached to the policy containing no such provision or condition, the mortgagee was entitled to recover, notwithstanding conditions in the policy which might defeat a recovery by the owner.

ERROR from the district court of Hall county.
Tried below before HARRISON, J.

The facts are stated in the opinion.

W. H. Platt and *Ralph Platt*, for plaintiff in error:

The assured, J. Nelson Jones, has no standing or rights under the policy. The pleadings and evidence show that long prior to the loss he parted with all interest he may have had in the

property. (*McCluskey v. Providence Washington Ins. Co.*, 126 Mass., 306; *Ætna Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385; *Wilson v. Hill*, 3 Met. [Mass.], 66.)

There was no valid assignment of the policy from Jones to the owner of the property at the time of the loss. The company is not liable to such owner. (*Jecko v. St. Louis Fire & Marine Ins. Co.*, 7 Mo. App., 308; *Morrison v. Tennessee Marine & Fire Ins. Co.*, 59 Am. Dec. [Mo.], 299.)

The company is not liable to the Bank of Commerce to which the loss, if any, was made payable. (*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 500; *Loring v. Manufacturers Ins. Co.*, 8 Gray [Mass.], 28; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *Davis v. German American Ins. Co.*, 135 Mass., 251.)

Reference is also made to the following cases: *Friemensdorf v. Watertown Ins. Co.*, 1 Fed. Rep., 68; *Bates v. Equitable Fire Ins. Co.*, 10 Wall. [U. S.], 33; *Illinois Mutual Fire Ins. Co. v. Fix*, 53 Ill., 151; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y., 401; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis., 378.

W. H. Thompson and W. A. Prince, contra.

References: *Wilson v. Conway Fire Ins. Co.*, 4 R. I., 141; *Columbia Ins. Co. v. Cooper*, 50 Pa. St., 331; *Neilson v. Harford*, 8 M. & W. [Eng.], 813; *Boner v. Mahle*, 3 La. Ann., 600; *Watrous v. McKie*, 54 Tex., 65.

IRVINE, C.

This was an action on a policy of fire insurance written in favor of J. Nelson Jones, and having attached an instrument signed by the agents issu-

ing the policy, the essential part of which is as follows: "Loss, if any, under this policy payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." The policy and the slip attached both bore date October 17, 1889, and were both executed on that day. The policy ran for five years from that date. Not far from the time when the policy was issued, the premises insured were conveyed to one Brownfield, and an assignment to Brownfield signed by Jones appears on the policy. This bears two dates,—October 17, 1889, and December 12, 1890. No written approval of this assignment appears on the policy. The Bank of Commerce was the owner of mortgages on the premises to the full amount of the policy. A total loss occurred October 19, 1890. In the district court there was a verdict and judgment for the plaintiff, which is defendant in error, to reverse which the insurance company brings the case here.

The contentions of the insurance company, based on proper assignments of error, are as follows:

First—That the conveyance to Brownfield was prior to the issuance of the policy, and that therefore Jones had no insurable interest, and the policy never took effect.

Second—That under the conditions of the policy it was avoided by the attempted assignment thereof before loss without the consent of the company.

Third—That what is styled the "loss payable clause" attached to the policy was merely a direction as to who should receive the proceeds in case of loss; that it was subject to all the conditions of the policy, and the policy not being

available to Jones because of a want of insurable interest by his conveyance of the property and assignment of the policy to Brownfield, the bank, deriving its rights entirely through Jones, cannot recover.

We shall consider these several propositions without special reference to the assignments of error on which they are based.

As to the first point, it is enough to say that there was evidence sufficient to sustain a finding that while negotiations had been carried on before the policy was issued, looking toward a sale of the property by Jones to Brownfield, and while a deed of conveyance had actually been executed, the deed had not been delivered and the contract of sale had not assumed an obligatory form until some time after the issuance of the policy. This issue was submitted to the jury under instructions, part of which were not excepted to by the company. It was properly a question for the jury. (*Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537.) The verdict on this issue cannot be disturbed, and it must therefore be taken as settled that Jones was the owner when the policy was issued.

We may pass over the second contention and assume, for the purposes of this case, that the subsequent transfer of the property and assignment of the policy by Jones to Brownfield would be sufficient to prevent a recovery by Jones and would vest no right in Brownfield. We do not think the soundness of this contention is necessarily involved in the decision of the case.

We therefore go directly to the claim of the plaintiff. The "loss payable clause" has already been quoted. In the body of the policy appears

the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be written upon, attached, or appended hereto." That the plaintiff did have an interest as mortgagee in the subject of insurance, and that this interest was created with the consent of the company is indisputable. The question is as to the construction of the latter portion of this clause. There can be no doubt that the "loss payable clause," and this clause quoted from the body of the policy, must be construed together. It is the contention of the insurance company, in effect, that the "loss payable clause" was not an independent contract between the mortgagee and the insurer, but was simply a direction as to payment, and that the mortgagee's rights must be derived through those of the owner, in spite of the clause in the body of the policy, which it claims should be so construed as to make all the conditions and provisions of the policy binding upon the mortgagee except as other stipulations in the "loss payable clause" might vary those provisions and conditions. If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The actual

contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party. But we do not see any marked ambiguity in this policy. We repeat the clause, omitting words not essential to its construction on the feature before us. "If * * * an interest * * * shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto." "The conditions hereinbefore contained shall apply," not absolutely, but in a qualified way, "in the manner expressed in such provisions and conditions * * * as shall be written upon, attached, or appended hereto;"—that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the "loss payable clause" nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable. The authorities cited by plaintiff in error are not op-

Steele v. Kearney Nat. Bank.

posed to this construction. In some cases the mortgage clause was not executed until after the policy had become voidable, and was then issued without new consideration while the insurer was ignorant of the facts avoiding the policy. In other cases the "loss payable clause" stood alone without provision in the policy as to its meaning or extent. In this case, in view of the clause in the policy, the "loss payable clause" must be taken as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy. So construed, the case falls within the rule announced in the *Phoenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb., 834. As we view the case, the mortgagee was entitled to recover to the extent of its interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

DUDLEY M. STEELE ET AL., APPELLANTS, V. KEARNEY NATIONAL BANK, APPELLEE, IMPLEADED WITH MEYER & RAAPKE ET AL., APPELLANTS.

FILED APRIL 7, 1896. No. 6383.

1. **Partnership: INSOLVENCY: ASSETS: TRUST FUNDS.** The assets of an insolvent partnership will in equity be treated as a trust fund for the payment of the firm creditors, and cannot be applied in satisfaction of the personal obligations of the individual partners to the prejudice of those to whom it equitably belongs.

2. ———: CHATTEL MORTGAGES: CREDITORS' BILL. Evidence examined and *held* to sustain the finding of the district court that the mortgage assailed was given to secure a partnership indebtedness.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

The opinion contains a statement of the case.

Dryden & Main, for appellants:

An insolvent partnership cannot secure with partnership assets an individual debt of one of the members of the firm to the exclusion of firm creditors; and an attempt to do so renders the entire security void, unless, from facts shown by the security itself, the individual and firm indebtedness can be separated. (*Keith v. Armstrong*, 26 N. W. Rep. [Wis.], 446; *Menagh v. Whitewell*, 52 N. Y., 146; *Arnold v. Hagerman*, 14 Am. St. Rep. [N. J.], 719; *Clements v. Jessup*, 36 N. J. Eq., 569; *Wilson v. Robertson*, 21 N. Y., 589; *Keith v. Fink*, 47 Ill., 272; *Heineman v. Hart*, 20 N. W. Rep. [Mich.], 792; *Phillips v. Ames*, 87 Mass., 185; *Patterson v. Seaton*, 28 N. W. Rep. [Ia.], 598; *Morehead v. Adams*, 18 Neb., 573; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Roop v. Herron*, 15 Neb., 80; *Smith v. Jones*, 18 Neb., 483; *Grover v. Wakeman*, 11 Wend. [N. Y.], 187.)

Charles B. Keller, also for appellants.

In an argument in favor of the point already stated reference was made to the following cases: *Wallach v. Wylie*, 28 Kan., 138; *Baldwin v. Short*, 125 N. Y., 553; *Denny v. Dana*, 2 Cush. [Mass.], 160; *Clark v. Lee*, 78 Mich., 221; *State v. Hope*, 102 Mo.,

410; *Russell v. Winne*, 37 N. Y., 591; *School District v. Randall*, 5 Neb., 411.

Marston & Nevius, contra.

POST, C. J.

This is an appeal from a decree of the district court for Buffalo county. The proceeding below was in the nature of a creditors' bill by the appellants, Dudley M. Steele & Co., to set aside a chattel mortgage executed by the firm of Hayden & Pargeter in favor of the appellee, Kearney National Bank, under date of July 13, 1891, covering a stock of general merchandise in the city of Kearney, to secure an alleged indebtedness of the mortgagors in the sum of \$2,990. Meyer & Raapke and Groneweg & Schoentgen, attaching creditors of Hayden & Pargeter, were made defendants and join with the plaintiffs in prosecuting an appeal from the decree of the district court in favor of the defendant bank.

The mortgage above mentioned is assailed upon the ground that the amount therein named, \$2,990, is largely in excess of the actual indebtedness of Hayden & Pargeter to the bank, and includes the sum of \$1,300 and over of the personal obligation of Richard Pargeter, a member of said firm. We agree with counsel for appellants that the assets of an insolvent partnership will in a court of equity be treated as a trust fund for the payment of the firm creditors, and that one partner will not be permitted to divert such property to the prejudice of those to whom it equitably belongs. (*Ripley v. Board of County Commissioners of Gage County*, 3 Neb., 397; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794; *Perkins*

v. Butler County, 46 Neb., 314.) But that question was distinctly raised by the pleadings and proofs, and the finding of the court upon the issue thus presented is entitled to the same consideration as would be accorded the verdict of a jury. (*Bank of Cass County v. Morrison*, 17 Neb., 341; *Bickel v. McAleer*, 35 Neb., 515.)

The circumstance chiefly relied upon in support of the appellants' claim is that the amount of a note for \$1,000, executed by Mr. Pargeter to the bank January 4, 1888, and secured by mortgage upon certain lands in Sherman county, was included in the alleged indebtedness of Hayden & Pargeter. It appears, however, from the testimony of Mr. Pargeter given in behalf of appellants that the \$1,000 note represented money borrowed for said firm and used in the partnership business; that it was, in short, not his individual indebtedness, but the debt of Hayden & Pargeter, and that the note and mortgage executed by him were intended as security for said firm, in which he is corroborated by Mr. Tillson, cashier of the bank. This evidence is quite sufficient to sustain the finding of the district court. The decree will therefore be

AFFIRMED.

JOHN C. GRISWOLD V. WILLIAM F. HUTCHINSON
ET AL.

FILED APRIL 7, 1896. No. 6449.

Physicians and Surgeons: MALPRACTICE. The law does not exact from physicians and surgeons the utmost degree of care, or the highest attainable skill in the practice of

their profession, although they, by virtue of their relation toward patients, impliedly engage that they possess ordinary knowledge and skill, and that they will, in the course of their employment, exercise such proper care and attention as may be reasonably expected from members of their profession. (*Hewitt v. Eisenbart*, 36 Neb., 794.)

ERROR from the district court of Madison county. Tried below before ALLEN, J.

Campbell & Wallis, H. C. Brome, and Clarke Gapin,
for plaintiff in error.

John S. Robinson and W. E. Reed, contra.

Post, C. J.

On the trial of this cause in the district court for Madison county judgment was entered in favor of the defendants therein upon a verdict rendered in accordance with the peremptory instruction of the court, and which it is sought to reverse by means of this proceeding.

According to the allegations of the petition below the plaintiff therein employed the defendants, who are practicing physicians and surgeons, to treat his (plaintiff's) wife for an ailment pronounced by said defendants to be an ovarian tumor; that acting upon the advice of the defendants he accompanied his said wife from his home in Madison county to the city of Omaha, where, after an examination of her person, they (defendants) advised an operation for the removal of said supposed tumor; that relying upon the knowledge and skill of defendants, and believing that they had made a careful and proper examination of the person of his wife, and believing such operation to be necessary in order to save her life, he entered

into a contract whereby he agreed to pay therefor the sum of \$200; that the defendants thereupon proceeded in the absence of the plaintiff to perform said operation by making an incision in his wife's abdomen, and advising him and his said wife that such operation had been entirely successful and that they had removed from the person of the latter an ovarian tumor of large size, whereupon he paid to the defendants the sum of \$200, the agreed price for their services in that behalf; that he paid out and expended in caring for his wife in consequence of said operation the sum of \$79, and that his own time thus necessarily employed is of the value of \$40. He alleges further that subsequent to the payment of the defendants' bill he learned that his wife was not suffering from an ovarian tumor, and that the defendants had not removed from her person a tumor of any kind, but that her only ailment was a fibroid tumor of the uterus, which fact, although discovered by the defendants upon the opening of her abdomen, was by them fraudulently concealed from him until about the time of the commencement of this action; that if the examination of his wife's person had been conducted with reasonable care and skill the nature and extent of her ailment would have been disclosed, but that such examination was carelessly, negligently, and improperly made by the defendants, and that in consequence of such wrongful and negligent acts his wife has been permanently injured in health, to his damage in the loss of her service, etc. The defendants answered separately, Doctor Hutchinson admitting that he is a practicing physician and surgeon residing in Madison county; that Elizabeth Griswold, mentioned in the petition, is

the wife of the plaintiff, and denying the other allegations thereof. Doctor Foote, after an admission in substantially the same language as that employed by his co-defendant, admits the performance of an operation upon the person of the plaintiff's wife, and the receipt therefor of the sum of \$200 as alleged, but denies the charge of negligence, and alleges that said operation "was skillfully performed, and that the same was necessary to a correct understanding of the ailment from which the said Elizabeth Griswold was suffering." The plaintiff, by way of reply, denied the allegations of new matter in the respective answers.

One proposition clearly established by the record is that the defendants were mistaken respecting the cause of Mrs. Griswold's affliction, which, according to their diagnosis, was an ovarian tumor, but which was, as alleged, during the operation mentioned discovered to be a fibroid tumor of the uterus. The evidence bearing directly upon that subject was given by Dr. Sprague, who, by invitation of defendants, witnessed the operation, and who testified, in substance, that no tumor was removed from the person of the patient; also, by Mrs. Brown, proprietress of the hospital in the city of Omaha to which Mrs. Griswold had been taken for the purpose of the operation, who testified to a conversation with Dr. Foote shortly thereafter, in which the latter remarked that the only tumors discovered during the operation were immovable fibroid tumors of the uterus, and in which conversation he requested the witness to make no statement concerning the subject to Mrs. Griswold's friends. It is shown that Dr. Hutchinson made a super-

ficial examination when first consulted upon the subject, which satisfied him respecting the cause of the illness from which Mrs. Griswold was suffering, and that the only other examination was made by Dr. Foote in the presence of his co-defendant the day preceding the operation. As to what transpired at the time last mentioned the plaintiff testified: "Dr. Foote made the examination. He first placed her (the patient) in his chair and exposed the abdomen, and with his hands pressed in every way, pushing and working the abdomen in every possible way. Then he took one hand and tapped, and then the other, then one side and then the other, and then from below. That is all the external examination he made. Then after that he inserted his finger in the vagina and seemed to be feeling of the uterus. * * * I think the first remark was made by Dr. Foote to Dr. Hutchinson. He said, 'Doctor, it is just as you said.' My wife next asked the question 'What is it?' He said, 'It is an ovarian tumor, no doubt about it.'" The examination referred to by the witness did not consume to exceed ten minutes and was made without the assistance of instruments or of an anæsthetic of any kind. The plaintiff called as witnesses several physicians and surgeons, who concur in the opinion that an operation should not be attempted for a suspected uterine or ovarian tumor without a most thorough examination of the person of the patient; and they agree that in all cases of doubt, where the theory of pregnancy is excluded, the uterus should be explored by means of a sound in order to ascertain the depth of that organ. One witness, Dr. Crummer, testified as follows:

Q. Is there any case except in which the tumor

has attained such a size where the life of the patient demands its immediate removal, in which it can be said that the sounding of the uterus might be omitted from the diagnosis of the case and still an attempt be made to perform an operation?

A. No, I think there would be nothing to justify an operation in the case except something that would threaten the life of the patient. * * *

A complete and thorough examination of the case where an abdominal tumor is suspected would be by several methods; first, by palpation, which simply means the use of the hands over the abdomen; a feeling of the parts by careful manipulation of the hands over the abdomen, and percussion or tapping of the parts with the fingers externally, or with some instrument to get the sounds elicited by percussion; an examination of the parts that can be reached through the vagina; by measurement of the abdomen as to the breadth and height of the mass; an examination with the vaginal speculum; and in many other cases, and in all case of doubt where pregnancy is absent, the use of the uterine sound. * * *

Q. Are the methods of examination you have suggested necessary and indispensable to a careful and proper examination of the patient where pregnancy does not exist and the presence of a tumor is suspected?

A. Yes, sir; of course where there is a prospect of an operation, it always demands a more careful examination if possible than a man would make simply for the purpose of trying to tell the patient in a general way what the matter is. The very fact that a man is going to make an operation increases his responsibility in diagnosing the case,

and he had better make a mistake where he is not going to operate than where he is.

Dr. Somers, another witness, testified that the surgeon should be able, by means of conjoined manipulation, *i. e.*, a digital exploration of the vagina with one hand and the manipulation of the abdomen with the other to determine "to a tolerable certainty" the size and location of the tumor, and whether it is liquid or solid; that if connected with the uterus it is pretty certain to be solid, and if connected with the ovaries it is pretty certain to be a cyst.

It is not pretended that there was in this instance any suspicion of pregnancy, and no objection existed on that ground to the exploration of the uterus in determining the location and character of the tumorous growth. Nor can it on the record before us be contended that this case is within the other exception mentioned by Dr. Crummer, *viz.*, where the condition of the patient is so critical as to require heroic treatment, and where an operation is justifiable as a last resort without the precautionary sounding of the uterus. The testimony of the medical witnesses tends therefore directly to prove the wrong alleged, *viz.*, negligence in the examination of the plaintiff's wife and the consequent unfortunate result thereof. We agree with counsel for defendants that physicians and surgeons are not required to exercise the utmost degree of care or to possess the highest attainable skill in their profession. They do, however, by virtue of the relation assumed by them toward patients, impliedly engage that they possess ordinary skill and that they will in the course of their employment exercise such necessary and proper care and

attention as may reasonably be expected from members of their profession under like circumstances. (*Barney v. Pinkham*, 29 Neb., 350; *Hewitt v. Eisenbart*, 36 Neb., 794; *Smothers v. Hanks*, 34 Ia., 286; *Branner v. Stormont*, 9 Kan., 51; *Ely v. Wilbur*, 49 N. J. Law, 685; *Small v. Howard*, 128 Mass., 131; *Ordronaux*, Medical Jurisprudence, 42.) The rule above stated is not limited in its application to physicians and surgeons, but applies with equal force to the members of all professions, including attorneys and counselors at law, who assume to possess technical knowledge or skill.

There being competent proof upon the vital issue of the case and tending to sustain the cause of action charged against one of the defendants, a question was presented for submission to the jury, and the direction in favor of both defendants at the conclusion of the plaintiff's evidence was error calling for a reversal of the judgment so far at least as it applies to the defendant Dr. Foote. It remains to be determined whether the court erred in directing a verdict in favor of Dr. Hutchinson. Upon that question the conclusion reached from an examination of the record is that the engagement and responsibility of the last named defendant terminated with the employment of Dr. Foote. When first consulted upon the subject, he advised the plaintiff to consult some physician who was a specialist in that line, saying that he did not consider himself qualified to perform the required operation. To the question "Did Dr. Hutchinson say who you had better go to?" the plaintiff answered, "I don't think he advised any one very strong. The idea was to get the best doctor." He testified further that

just before the operation he made inquiry respecting Dr. Foote's charges, to which the latter answered, "The ordinary fee for such an operation is from \$300 to \$500, but Dr. Hutchinson tells me you are a poor man and work for your living. I have concluded, therefore, to make it \$200." There was some talk at that time about security for Dr. Foote's bill, the plaintiff not being provided with ready money, but before it was given Dr. Hutchinson renewed an offer previously made to advance the necessary funds on the plaintiff's personal note, which offer was accepted and the money thus advanced was, a few days later, by the plaintiff remitted to Dr. Foote at Omaha. Dr. Hutchinson's generosity in that regard, and the interest shown by him in the case, finds a ready explanation in the intimate, personal, and church relations existing between himself and the plaintiff's family. His attitude toward the case after surrendering the patient to the care and treatment of Dr. Foote was that of a friend and counselor only, and in no sense that of a physician or surgeon. The direction in his favor was accordingly right and the judgment as to him will be affirmed. Judgment for defendant Hutchinson affirmed. Judgment for defendant Foote

REVERSED.

C. A. MANKER v. L. P. SINE.**FILED APRIL 7, 1896. No. 6424.**

- 1. Satisfaction of Judgment.** The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.
- 2. Replevin: ALTERNATIVE JUDGMENT: SATISFACTION.** The plaintiff against whom in an action of replevin judgment had been rendered for the return of the property in dispute, or for the value thereof in case it could not be returned, paid the amount of costs assessed against him, also the damage awarded for the wrongful detention of the property, and thereupon made a sufficient tender of said property to the defendant. *Held*, A discharge of the alternative judgment, and that satisfaction thereof should on his motion be entered of record.

ERROR from the district court of Cass county.
Tried below before CHAPMAN, J.

Allen Beeson, for plaintiff in error.

Wooley & Gibson, contra.

POST, C. J.

This cause was before us at a previous term, at which time a judgment for the defendant in error was reversed, with directions to the district court for Cass county to enter an alternative judgment upon the verdict of the jury for a return of the property replevied, or for its value in case a return thereof could not be had. (See *Manker v. Sine*, 35 Neb., 746.) Judgment having been rendered in accordance with the mandate of this court, the plaintiff in error, who is also plaintiff below, tendered to the defendant the property in

controversy at the place where it was taken from the latter by virtue of the order of replevin. He also paid to the clerk of the district court the sum of \$24.63, costs assessed against him, and the further sum of \$1, being the damage awarded by the jury for the wrongful detention of said property, and thereupon, by motion, sought to have the alternative judgment against him discharged and satisfaction thereof entered of record. The evidence upon which said motion was heard and determined is not made a part of the record, although the facts as found are substantially as alleged in the motion, judged by the following entry:

"And now on this 29th day of May, 1893, it being one of the days of the regular 1893 term of this court, this cause came on for decision on the motion of the plaintiff for a cancellation of the judgment herein, and the court, being well and fully advised in the premises, doth find that the plaintiff, after the judgment was rendered upon the mandate from the supreme court in this cause, tendered to defendant the property replevied in this cause, and made said tender at the place where said property was taken from the defendant under the writ of replevin, and that plaintiff offered to return said property to defendant, and that plaintiff has made a sufficient tender of said property to defendant, but the court being of the opinion that there is no authority in this proceeding to cancel the alternative judgment, the court refuses to interfere with said judgment, to which ruling and action the plaintiff and defendant each excepts."

The object of this proceeding is to secure a reversal of the foregoing order and for the remanding of the cause in order that the judgment de-

scribed may be satisfied of record under the direction of the district court. The finding being in favor of the plaintiff as to the alleged tender of the property, and payment of the costs and damage for the wrongful detention of such property being undisputed, our investigation is confined to a single question of practice, viz., whether the judgment defendant may in such case proceed in a summary manner by motion for the satisfaction of the judgment against him, or whether his remedy is by bill in equity or other appropriate action. It is by section 322, Code of Civil Procedure, among other things provided that "whenever any judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Courts of general jurisdiction have an inherent supervisory control over their judgments and decrees. They may award process for the enforcement of their judgments and orders, and may, whenever necessary in order to correct or prevent abuse thereof, stay or quash any execution or other writ issued by their authority. The clerk is but the hand of the court, and whatever he is required to do in the discharge of his duties toward litigants or others may be enforced by the command of the court; and the duty to satisfy of record a judgment or decree, upon full performance by the party bound thereby, follows as a necessary incident of the power of the court to enforce its orders. (See *Briggs v. Thompson*, 20 Johns. [N. Y.], 294; *Shaw v. Dwight*, 27 N. Y., 244; *Harper v. Graham*, 20 O., 105; *Lough v. Pitman*, 26 Minn., 345; Black, Judgments, sec. 1014 *et seq.*) That an action may, in a proper case, be maintained

Allsman v. Daley.

for the cancellation of a judgment after payment in full, or on account of facts amounting to an accord and satisfaction, is not doubted, although the remedy by that means is at most cumulative. The plaintiff in the case at bar has, according to the finding of the district court, satisfied the judgment by a return of the property replevied. True, it may be inferred from the record that the defendant, for reasons not disclosed, refused to receive the property when returned in obedience to the judgment in his favor, but that fact cannot, in view of the finding of the district court, be regarded as material. The question is not whether the defendant in a replevin suit may, upon any conceivable state of facts, refuse to accept the property in dispute when tendered pursuant to an alternative judgment in his favor and afterward assert a substantial right thereunder, but whether, upon the facts of the case before us, the return of the property operated to discharge the alternative judgment. That question must, as we have seen, be answered in the affirmative. It follows that the order complained of should be reversed and the cause remanded with directions to satisfy of record the judgment herein mentioned.

REVERSED.

JOHN W. ALLSMAN V. WILLIAM DALEY.

FILED APRIL 7, 1896. No. 6465.

Sufficiency of Evidence: REVIEW. This case presents questions of fact only, and the judgment, being supported by sufficient evidence, should not be disturbed.

ERROR from the district court of Saline county.
Tried below before HASTINGS, J.

Abbott & Abbott, for plaintiff in error.

Hastings & McGintie, contra.

Post, C. J.

The defendant in error, plaintiff below, recovered a judgment against the plaintiff in error in the sum of \$63.35, upon a finding of the district court for Saline county, and which it is sought to reverse by means of this proceeding. The finding referred to is, in substance, that one Judy, with the knowledge and approval of the defendant below, and without the plaintiff's consent, took possession of a sulky, the property of the latter, to be used during certain races then impending; that said sulky, while so in the possession of the said Judy, was, through the negligence and improper driving of the latter, damaged to the amount of \$58.15, and for which, with interest, judgment was ordered.

The sole question presented by the record is that of the sufficiency of the evidence to sustain the finding of the district court. The utmost that can be claimed by the plaintiff in error is that the finding is against the weight of the evidence; but that proposition cannot be conceded. On the contrary, the finding and judgment appear to be supported by the decided weight of the evidence and must be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. M. C. STEEL, RECEIVER OF BEATRICE RAPID TRANSIT & POWER COMPANY.

FILED APRIL 7, 1896. No. 6355.

1. **Railroad Companies: EASEMENTS: STREET CROSSINGS.** An ordinance authorizing the crossing of the streets of a city by the tracks of a railroad company confers upon the corporation therein named no exclusive use of such crossing, but a use to be enjoyed in common with the general public.
2. ———: ———: **STREET RAILWAYS: DAMAGES.** A railroad company which has by ordinance acquired a permanent easement in the streets of a city, is not entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city.
3. ———: ———. *Calvert v. State*, 34 Neb., 616, distinguished.

ERROR from the district court of Gage county.
Tried below before BABCOCK, J.

John H. Ames, A. Hazlett, and J. W. Deweese, for plaintiff in error:

The defendant should be required to compensate plaintiff for damages as a condition precedent to constructing and using a crossing over the latter's right of way. (*Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich., 361; *Ford v. Santa Cruz R. Co.*, 59 Cal., 290; *McQuaid v. Portland & V. R. Co.*, 18 Ore., 237; *Sixth Avenue R. Co. v. Kerr*, 72 N. Y., 330; *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep., 687; *In re Rochester Water Commissioners*, 66 N. Y., 413; *People v. Dutchess & C. R. Co.*, 58 N. Y., 152; *People v. Chicago & A. R. Co.*, 67 Ill., 118; *In re Trenton Water Power Co.*, 20

Chicago, B. & Q. R. Co. v. Steel.

N. J. Law, 659; *People v. Troy & B. R. Co.*, 37 How. Pr. [N. Y.], 427; *State v. Northern R. Co.*, 9 Rich. [S. Car.], 247; *State v. Minneapolis & St. L. R. Co.*, 39 Minn., 219; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. [U. S.], 219; *Little Miami & C. & X. R. Co. v. City of Dayton*, 23 O. St., 510; *In re City of Buffalo*, 68 N. Y., 167; *Milwaukee & St. P. R. Co. v. City of Faribault*, 23 Minn., 167; *Railroad Company's Appeal*, 93 Pa. St., 150, 122 Pa. St., 511; *Pennsylvania R. Co. v. Braddock Electric R. Co.*, 25 Atl. Rep. [Pa.], 780; *Grand Rapids N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich., 265; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 62 Mich., 564; *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich., 350; *People v. Lake Shore & M. S. R. Co.*, 52 Mich., 277; *St. Paul, M. & M. R. Co. v. City of Minneapolis*, 35 Minn., 141.)

J. E. Cobbey, contra.

References: *Chicago, B. & Q. R. Co. v. City of Quincy*, 28 N. E. Rep. [Ill.], 1069; *Highland Avenue & B. R. Co. v. Birmingham U. R. Co.*, 9 So. Rep. [Ala.], 569; *Buffalo, R. & P. R. Co. v. Du Bois T. P. R. Co.*, 24 Atl. Rep. [Pa.], 181; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 40 N. E. Rep. [Ill.], 1008; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 3 L. R. A. [Mo.], 240; *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep., 331; *Owensborough & W. R. Co. v. Sutton*, 13 S. W. Rep. [Ky.], 1086; *Houston & T. C. R. Co. v. Carson*, 1 S. W. Rep. [Tex.], 107; *Dubach v. Hannibal & St. J. R. Co.*, 1 S. W. Rep. [Mo.], 86.

Post, C. J.

A question distinctly presented by this record is whether a steam railroad company, which has

by ordinance acquired a permanent easement in the streets of a city, is entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city. Adjudications directly in point are by no means numerous, although the question appears, whenever presented for determination, to have been resolved in the negative as an independent proposition, unaffected by the inquiry whether street car tracks are, or are not, an additional burden upon adjoining private property.

In *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 32 Atl. Rep. [Conn.], 953, the identical question was presented upon the application of the plaintiff for an injunction to restrain the threatened crossing by the defendant of its tracks in the city of Bridgeport. In the opinion of the court reversing the decree below for the plaintiff, this language is used: "It is further insisted that these special grants, if otherwise effectual, give the defendant no right to construct the crossing without first making compensation for the direct damage it will do to the plaintiff's property. The injunction was asked to prevent a threatened obstruction of the plaintiff's right of way. It is not alleged or found that it owns the fee of the highway. It has only a right to cross it at grade. The defendant's tracks are laid upon the highway by the authority of the state and as a highway for public travel. We are not called upon to consider whether electric cars impose any additional burden upon land occupied for a highway for which the owner of such land can claim compensation. The plaintiff is not in a position to raise that question. It claims

that the proposed crossing at Fairfield avenue will affect the safe and beneficial use of its right of way at that point, and thereby impair the general value of its franchises and property. But it holds these subject to the police power of the state, under which the use of highways for all purposes of public travel is fully within the control of the legislature."

The supreme court of Indiana, in *Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co.*, 139 Ind., 297, affirmed a decree of the circuit court restraining the defendant below—a steam railroad company—from interfering with the construction of the plaintiff's street car line across its tracks in the city of Hammond. Referring to the question of compensation it is there said: "Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which it is claimed is a taking of private property without just compensation, in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But having obtained its right of way subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof, in the ordinary and proper manner, for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings, in the ordinary and in a proper manner, for the

construction of street railway crossings, and that it had been hindered and obstructed therein by the appellant by the use of force. It would therefore not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the streets named free from the burden of the public easement, a part of which belongs to the appellee, the street railway."

In *Du Bois T. P. R. Co. v. Buffalo R. & P. R. Co.*, 149 Pa. St., 1, the supreme court approve of an opinion by the common pleas judge, from which we quote the following: "There is therefore no such injury or damage done to the respondent's rights as are the subject of compensation in damages. The crossing of its track by the passenger railway company gives no greater right to damages, in the view we take of the case, than it would have if the claim was made against an omnibus line."

The same question was carefully considered by the supreme court of Illinois in *Chicago, B. & Q. R. Co. v. West Chicago S. R. Co.*, 156 Ill., 255, in which it is held that an ordinance of the city of Chicago authorizing the plaintiff to lay and operate its tracks across certain streets did not confer upon it an exclusive use of such crossings, but a use thereof to be enjoyed in common with the public; also that a railroad company which has acquired a permanent easement in the streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway company under permission from the city, such easement being subordinate to the rights of the public, and the use of street cars being a le-

gitimate exercise of the public right is in no sense a violation thereof.

There are to be found many cases which rest upon the same principle as the foregoing, and in harmony therewith, but involving controversies between railroad companies or between street railway companies claiming superior easements in public streets. (See *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97 Mo., 457; *Highland Avenue & B. R. Co. v. Birmingham U. R. Co.*, 9 So. Rep. [Ala.], 568; *Market Street R. Co. v. Central R. Co.*, 51 Cal., 583; *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep., 729.)

Calvert v. State, 34 Neb., 616, cited as opposed to the conclusion announced, is not in point, as that case turned upon an entirely different question. True the subject here involved was there suggested, although incidentally, as shown by the following language of MAXWELL, C. J., on page 632: "Whether the right exists to construct such a track across the network of railway tracks where trains are being constantly made up, we do not decide, because the question is not presented."

The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines

by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*.

There are other questions presented by the record and other sufficient reasons for affirming the decree of the district court, but which, in view of the conclusion above stated, need not be noticed.

AFFIRMED.

**FARMERS & MERCHANTS INSURANCE COMPANY V.
JACOB PETERSON.**

47 747
56 486

FILED APRIL 7, 1896. No. 6474.

1. **Insurance: TITLE OF INSURED: EVIDENCE.** A policy of insurance is *prima facie* an admission, by the insurers, of the title of the insured to the property embraced in the policy. *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495, followed.
2. ———: **INCUMBRANCES: PLEADING.** In an action on a policy of insurance, a breach of the contract thereof, such as incumbering the property, is a matter of defense to be pleaded and proved by the company, and it is not incumbent upon the insured to negative the fact in the first instance either in pleading or proof.
3. ———: ———: ———. The reply in this case *held* to admit that the provision for forfeiture of the insurance if the property should be incumbered was one of the stipulations of the contract of insurance, but that it did not admit the signing of the application alleged in the answer, nor the mortgaging of the property by the insured.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

J. C. Crawford, for plaintiff in error.

A. R. Oleson and C. C. McNish, contra.

HARRISON, J.

On the 8th day of October, 1892, the defendant in error commenced this action against the plaintiff in error in the district court of Cuming county to recover the sum of \$1,250, alleged to be his due by reason of the destruction by fire of property of which he was the owner, and covering which and insuring him against such destruction he held a policy issued by plaintiff in error, hereinafter referred to as the "company." An answer and a reply were filed whereby issues were joined and a trial thereof had before the court and a jury. The defendant in error was sworn and testified. The issuance of the policy and the insurance thereby of the property had been established by the pleadings. During the time the defendant in error was testifying in his own behalf it was admitted on the part of the company that the premium, or consideration for the contract of insurance, had been paid by defendant in error; that of the property insured there had been destroyed by fire of date January 29, 1892, sufficient to aggregate in value \$1,097; that due notice of the loss had been given and demand made for payment. It was proved that no payment had ever been made. At the close of his own testimony, with the facts as just indicated either admitted or proved, the defendant in error rested his case. For what further occurred at this stage of the proceedings we will quote from the record: "At this time the defendant moved that the case be dismissed for the reason that it is incumbent upon the plaintiff to prove, as alleged, that he has kept and performed his part of the agreement, which they haven't

attempted to prove. Motion overruled, to which ruling defendant excepts. Whereupon defendant rested. At this time plaintiff asked the court to instruct the jury to return a verdict for plaintiff for the amount of \$1,097 and interest from the 29th day of January, 1892. At this time the defendant asked the court to instruct the jury that they cannot bring in a verdict for the plaintiff exceeding the amount defendant offered to admit, \$190.63. Instruction asked for by plaintiff given, to which instruction defendant excepts. Instructions asked for by defendant denied, to which ruling defendant excepts." The jury, in accordance with the instruction of the court, returned a verdict for plaintiff in the sum of \$1,132.20, being the \$1,097 and interest thereon, and after motion for new trial heard and overruled, judgment was rendered for such sum. The case is presented here by error proceedings in behalf of the company.

It is urged that the defendant in error did not prove his ownership of the insured property, either at the time of its insurance or of its destruction by fire. On this point it may be said it has been held by this court: "A policy of insurance is *prima facie* an admission by the insurers of the title of the insured to the property embraced in the policy." (*Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495.) In the text of the opinion in that case it was observed: "The mere fact of the contract of insurance being effected, should, we think, be enough *prima facie* to prove the ownership of the property. If the contract was procured by fraud and such ownership did not exist, or if the insurance was simply a wager policy, it was proper matter of defense, and if

relied upon should be pleaded as a defense. The same may be said of the second objection, that it is not alleged that defendant in error was the owner of the horse at the time of his death."

It is insisted that the defendant in error, having pleaded in his petition that he kept and performed all and singular the conditions of the policy on his part to be kept and performed, and this allegation being denied in the answer of the company, it devolved on plaintiff in error to prove that there had been no breach of the condition of the policy by which it was stated that it was avoided if the property was mortgaged or incumbered while insured. This was a matter of defense, and it was for the company to allege it and prove it, and it was not the duty of the insured to, in the first instance, negative the fact that the property had been mortgaged, in either pleading or proof, or to prove it under the general allegations in respect to the conditions of the policy hereinbefore set forth. (*Butternut Mfg. Co. v. Manufacturers Mutual Fire Ins. Co.*, 47 N. W. Rep. [Wis.], 366; *Perine v. Grand Lodge A. O. U. W.*, 53 N. W. Rep. [Minn.], 367; *Price v. Phoenix Mutual Ins. Co.*, 17 Minn., 497; *Bank of River Falls v. German-American Ins. Co.*, 40 N. W. Rep. [Wis.], 506.)

For a thorough understanding of the further question discussed in the briefs it will be necessary to know fully certain allegations of the answer of the company and the reply thereto. In the answer it was alleged:

"This defendant, for further answer to plaintiff's petition, says that prior to the issuance of the policy of insurance to the plaintiff by this defendant the plaintiff made a written application for said insurance in which he stated that

none of said property was incumbered in any way, together with various other statements therein contained, a copy of which application is hereto attached and made a part hereof and marked exhibit 'A;' that relying upon the truth of the statements therein contained the defendant issued the policy insuring the property in said application described.

"8. That the said policy of insurance sued on in this action contains the following conditions: 'This insurance is based on the representations contained in the assured's application of even number herewith, on file in the company's office in Lincoln, Nebraska, each and every statement of which is hereby specifically made a warranty and a part hereof; and it is agreed that if any false statements are made in said application this policy shall be void * * * or if the property be or shall hereafter become mortgaged or incumbered; or upon commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if this policy shall be assigned * * * then, in each and every one of the above cases, this policy shall be null and void;' that notwithstanding the representations made by the plaintiff in his application, on the faith of which said policy was issued, and notwithstanding the conditions contained in said policy, the plaintiff did not own the stock mentioned in said application and policy at the dates of said application and at the time the said property was insured by defendant, but had conveyed the same or a portion thereof by chattel mortgage to Jurgen Peterson on March 17, 1891; that, in violation of the conditions contained in

said policy of insurance, plaintiff conveyed the live stock described in said application and said policy of insurance to one Soren Amderson, of Thurston county, Nebraska, by chattel mortgage on the 1st day of October, 1891, and on the 21st day of July, 1891, plaintiff conveyed four of the horses described in said policy to the Beemer State Bank, whereby said policy became void and of no force or effect.

“9. Defendant for further answer says that the said plaintiff obtained the said policy of insurance by fraud and misrepresentation in that he represented that, at the time said application was made for said insurance, none of said property was incumbered in any way, whereas a large portion of said property was incumbered by chattel mortgage, and the statement of the said plaintiff that the same was not incumbered was false and was known to be false by the plaintiff at the time he made the same.”

The reply was as follows:

“The plaintiff, for reply to the defendant’s answer in the above entitled cause, denies each and every allegation of new matter therein set forth, except such matter and facts as are hereinafter expressly admitted.

“2. The plaintiff admits that he signed an application for insurance to the said defendant through their agent, W. H. Fleming, but that he signed such application for insurance upon the reliance placed in the representations of said W. H. Fleming; that the said agent did not read nor cause to be read, nor make known to this plaintiff, any of the interrogatories or representations in said application to this plaintiff, that said agent having the said plaintiff believe at the time he

signed such application that it was a matter of form; that the said plaintiff is unable to read the English language, and therefore could not inform himself as to the contents of said application and did not know the contents thereof; and that the said W. H. Fleming did not, at the time he delivered the policy of insurance to said plaintiff, make known any of the conditions therein, other than stating to said plaintiff that the fine print therein contained would not affect his insurance in any manner; and the plaintiff, being unable to read the same, relied on those representations and was wholly unacquainted with the contents thereof, except believing that the said W. H. Fleming truly represented the effect of said application and policy at the time the same were made and delivered."

It is contended for the company that the reply was in effect a plea in confession and avoidance, and that by it there was admitted the making of the application and its statements, also the requirements of the conditions of the policy quoted in the portion of the answer which we have set forth herein, and the further facts of the existence of the mortgage on the property at the time it was insured and the execution of the other mortgages covering it, or portions of it, as stated in the answer; that these facts being thus admitted, it established the defense in favor of the company, and hence it was error for the court to instruct the jury to return a verdict for defendant in error. Counsel for defendant in error strenuously insist that the reply is not and cannot be considered or construed as an admission to the extent it is claimed to be by counsel for the company, and in this connection attention is directed

to the statement in the reply in respect to the application, whereby it is said "The plaintiff admits that he signed an application," and it is argued that this was not an admission of the existence of the application pleaded in the answer; that by the use of the word "an" the pleader merely admitted the fact of signing an application without reference to any particular one or the one attached to the answer; that the denial, in the reply, of all new matter contained in the answer applied to the application therein included and the fact of its making, and the burden was upon the company to identify or prove the application pleaded in the answer to be the one signed by defendant in error. The ordinary meaning or force of the words employed in the reply was not to admit the signing of any special application, or the application set forth in and made a part of the answer, but to admit the signing of one or some application; and the fact of the making of the one constituting a part of the answer having been denied, it was for the company to prove it.

But there was pleaded in the answer a clause in the policy by which all rights under it were forfeited if the property insured was mortgaged or incumbered at any time during the existence of the policy, and in the reply matter was pleaded in avoidance of this condition. This clearly admitted it as one of the stipulations of the contract of insurance. Did the plea of avoidance in the reply also admit the mortgaging of the property? We do not think so. "Where the answer contains new matter, the plaintiff may reply to such new matter denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without

repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." (Code of Civil Procedure, sec. 109.) The plea of new matter in the reply, if a good plea (a question which was not raised or discussed in the briefs and which we will not discuss or determine), contained matter in avoidance of the operations of all the conditions of the contract of insurance printed in small type, and its effect was to admit the existence of the stipulations in all their requirements, but, as we view it, it did not extend further and necessarily admit the making of mortgages upon the insured property or breaches of any of the conditions. These facts were denied in the reply, and the issue thus raised was not one inconsistent with the admission of the existence of the conditions and their avoidance, and the defendant in error was entitled to have his denial of the giving of the mortgages stand, and rely upon it, and the company should have introduced proof of such traversed facts. Had the plea of avoidance in the reply, instead of being general, as it was, been a special one, and directed against the particular conditions pleaded in the answer, and applied the avoidance to the particular alleged breach, of mortgaging the insured property, in terms, then it would have been an admission of the facts relied upon as constituting the breach. The plea of avoidance, if good and sustained, would, it is true, have been as effectual against the condition providing for a forfeiture of the contract of insurance if a mortgage was given, as it would have been as to any other, but it was framed to apply generally, and its existence and force as a plea would not be inconsistent with the force or exist-

ence of the general denial of the execution of the mortgages, and the defendant in error could of right insist on both.

The conclusions herein reached are such as to show a condition of the issues in the case upon the pleadings and proofs before the trial court at the time it directed the verdict for defendant in error which warranted such direction, and the judgment must be

AFFIRMED.

**WILLIAM W. BARNHOUSE ET AL. V. VILLAGE OF
ADAMS.**

FILED APRIL 7, 1896. No. 6392.

Final Order: REVIEW. To entitle a party to a review by this court of the rulings of the district court, there must have been a final judgment rendered on the merits of the cause in the trial court.

ERROR from the district court of Gage county.
Tried below before BUSH, J.

*J. C. Johnston and Charles E. Bush, for plaintiffs
in error.*

George A. Murphy, contra.

HARRISON, J.

This action, or proceeding, was commenced in the district court of Gage county, the object or purpose being to have disconnected from the village of Adams, in such county, certain pieces or tracts of land or territory described in the peti-

tion. The descriptions of the tracts of land and averments as to their ownership, as stated in the petition, to the extent we need notice them, were as follows:

"These applicants further aver that said Mrs. S. Disher owns the north half of the northeast quarter of said section 27, and also the northeast quarter of the northwest quarter of said section 27; that said Benjamin Harnley owns the northwest quarter of the northwest quarter of said section 27, and blocks 3 and 7 and the east half of block 2 of Harnley's Division, which is a part of the south half of the northwest quarter of said section 27; that said Jacob Hildebrand owns the southwest quarter of said section 27; that said T. J. Iden owns the south half of the southeast quarter of said section 27; that said Mrs. Bryson owns the west twenty acres of the south half of the southwest quarter of said section 26; and that said Naomi and T. D. Moseby own the west twenty acres of the north half of the southwest quarter of said section 26, also the west twenty acres of the south half of the northwest quarter of said section 26.

"These applicants further aver that said W. W. Barnhouse owns a part of the south half of the northwest quarter of said section 27 which is described as follows: Commencing at the center of the south line of the south half of the northwest quarter of section 27, in township 6, range 8 east, running thence east 18 rods, thence north 36 rods, thence west 18 rods, and thence south 36 rods, also commencing at same point and running thence north 36 rods, thence west 6 rods, thence south 36 rods, and thence east 6 rods to place of

beginning, which is also upon the border and within the corporate limits of said village of Adams, and said Barnhouse is the sole occupant thereof."

An answer was filed for the village, to which there was a reply, and of the issues joined there was a trial to the court with the following result, according to the record presented in this court:

"And now on this 3d day of March, A. D. 1893, it being the twenty-third day of the term, this cause coming on to be heard and all parties being present in open court, and after the introduction of the evidence and arguments of counsel, the court, being fully advised in the premises, finds that plaintiff Elizabeth Bryson is the owner of the west twenty acres of the south half of the southwest quarter of section 26 mentioned in the petition, and finds generally in favor of the said Bryson. The court further finds for plaintiff Benjamin Harnley, and that he is the owner of the northwest quarter of the northwest quarter of section 27 mentioned in the petition. The court finds generally in favor of the plaintiff Jacob Hildebrand, and that he is the owner of the west half of the southwest quarter of said section 27 and all of the southeast quarter of the southwest quarter of said section 27 except a strip recently sold off of the north side thereof. The court further finds for the plaintiff Thomas J. Iden, and that he is the owner of the south half of the southeast quarter of said section 27. The court further finds that all of the lands above mentioned are on the border of the village of Adams and that all of the said lands are used for farming purposes, and that it is an injury thereto and to the owners

thereof to have said lands retained within the corporate limits of said village of Adams, Nebraska, and that said lands were wrongfully taken into said corporate limits of said village of Adams, Nebraska. The court further finds, as to the balance and residue of the lands and real estate mentioned and described in said petition, for the defendant; to which latter finding plaintiffs each of them except, whereupon said plaintiffs generally and plaintiffs Disher, Naomi Moseby, and Hildebrand, each for himself and herself, having filed motions for new trial, it is ordered, considered, and adjudged by the court that said motions and each of them be and the same are hereby overruled, to which ruling said plaintiffs generally and each of the above named plaintiffs separately except.

“Whereupon it is considered, adjudged, and decreed that the west twenty acres of the south half of the southwest quarter of said section 26, in township 6 north, of range 8, and the northwest quarter of the northwest quarter of section 27, in township 6 north of range 8, and the west half of the southwest quarter of said section 27, and all that part of the southeast quarter of the southwest quarter of said section 27 not heretofore sold by Jacob Hildebrand, and all of the south half of the southeast quarter of said section 27 be, and the same are hereby, disconnected from and taken out of the corporate limits of said village of Adams and that the same from henceforth cease to be a part of the corporate limits of said village.

“And now on this 15th day of March, 1893, it being the thirty-first day of the term, this cause

coming on to be heard further, and each party is ordered to pay his own costs."

Separate motions for new trial were filed on behalf of Jacob Hildebrand, Sarah Disher, and Mrs. T. D. Moseby, and a joint one filed for all the plaintiffs, the journal entry in regard to the disposition made of them being as follows:

"And now on this 17th day of March, 1893, it being the thirty-second day of the term, this cause coming on to be heard upon the motions for new trial, and the court being duly advised in the premises overrules all of said motions, to which ruling of the court the plaintiffs except. Plaintiffs pray an appeal, which is allowed by the court, and forty days given to prepare bill of exceptions."

The complaint in the petition in error is in the following terms:

"The appellants complain of the said defendant, for that on the 1st day of March, A. D. 1893, the appellee recovered a judgment against them herein in the district court of Gage county, Nebraska, dismissing appellants' cause of action in a case wherein William W. Barnhouse *et al.* were plaintiffs, and the Village of Adams was defendant. A transcript of the proceedings containing said final judgment is filed herewith."

By referring back to the journal entry of the decree which was rendered it will be ascertained that there was no such judgment as is alleged to be erroneous. There is a final decree as to the rights of some of the parties to the action, by which the territory belonging to them was disconnected from the village, but, as to the rights of the parties who removed the case to this court,

Beavers v. Missouri P. R. Co.

while there was a general finding adverse to them, there is no final disposition thereof, nor is the action as to them dismissed. No final judgment having been rendered, there is nothing which this court can affirm or reverse. The judgment for costs is not one from which appeal or error will lie. It follows that the petition in error must be dismissed and such order is hereby made.

DISMISSED.

PHILIP H. BEAVERS V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED APRIL 7, 1896. No. 6464.

1. **Review: ASSIGNMENTS OF ERROR.** To present for review errors alleged to have occurred during the trial of a cause the assignment should, in apt words, set forth some matter for which a motion for a new trial is authorized by the Code of Civil Procedure.
2. ———: ———. An assignment of error that "The verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of the recovery by the jury independently, or aside from the consideration of the influence of passion, prejudice, or undue means.
3. ———: ———. Neither is such question presented by the portion of the assignment quoted, contained in the following words: "The verdict is contrary to the evidence." Error in the assessment of the amount of recovery, whether too large or too small, has been specifically stated in the Code as one of the grounds of a motion for new trial (Code, sec. 314), from which it is clear that it was not included in either of the other causes.
4. **Railroad Companies: DAMAGE TO RESIDENCE PROPERTY: VERDICT FOR PLAINTIFF.** *Held*, That a consideration of

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56	761

47	761
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all the evidence discloses that the jury were not governed by passion, prejudice, or undue means in the assessment of the amount of recovery.

5. **Instructions: REPETITIONS.** It is not error to refuse to give an instruction requested in behalf of either party to a cause, where the subject-matter of the instruction is fully stated and explained in the charge of the court to the jury.
6. ———: **HARMLESS ERROR.** It is not error calling for a reversal of a judgment to give an instruction which could not, and it is clear did not, prejudice the rights of the complaining party.

ERROR from the district court of Saline county.
Tried below before HASTINGS, J.

Abbott & Abbott, for plaintiff in error.

F. I. Foss, B. P. Waggener, J. W. Orr, and David Martin, contra.

HARRISON, J.

This is an action instituted in the district court of Saline county to recover damages alleged to have resulted to plaintiff's residence property, some lots and his dwelling situated in the city of Crete, from the location and operation, in proximity thereto, of defendant's railroad, its main line and a switch, and also its roundhouse in the city named. Issues were joined and a trial had to the court and a jury. A verdict in the sum of \$100 was returned for plaintiff, and after motion for new trial in behalf of either party was overruled, judgment was rendered on the verdict. The plaintiff brings the case to this court by error proceedings.

It is claimed that the amount of the recovery is too small; that the testimony shows damages to

the property in a much larger sum than was allowed by the jury. The only assignment in the motion for new trial which can be said to have any reference to this point is as follows: "First, the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means." This does not raise the question of an error in the assessment of the amount of recovery unaffected by passion, prejudice, or undue means. If this was sought to be done there should have been an assignment in apt words, which would have set forth the fifth cause, for which it is stated in our Code of Civil Procedure a new trial will be granted, viz.: "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." (Code, sec. 314; *Barnby v. Wolfe*, 44 Neb., 77.) Error in the assessment of the amount by the jury is not raised by the portion of the assignment that the verdict is contrary to the evidence. Errors in the assessment of damages must be assigned in the motion for a new trial, and the Code having given this as one of the special grounds for a motion for new trial, it is clear that it was not included in either of the others. (*Riverside Coal Co. v. Holmes*, 36 Neb., 858.) The only point that can be said to be presented by this assignment in the motion for new trial is that the verdict is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means. It is true that there was evidence which would have warranted the assessment of a much larger sum as the amount of recovery; on the contrary, there

was also testimony which tended to show that the damages were even less than the amount of the verdict, and, when viewed in connection with all the evidence adduced on the subject of the sum of damages, it is quite plain that the jury could not have been influenced by either passion, prejudice, or undue means in fixing the amount of the recovery. This being true, the portion of the attack on the verdict now under consideration must be overruled.

The plaintiff complains of the refusal of the court to give the third instruction requested to be read for him, which was as follows: "In estimating the value of plaintiff's property you should not be governed by the price that it would bring at forced sale, or the price that could be obtained for it from a speculator who might buy it for the purpose of speculation; but you should consider what it is worth to the owner for the purpose for which he uses it and desires to use it." The court charged the jury on the subject embraced in the instruction offered in the following language:

"If you shall find for the plaintiff in this action, you should assess his damages at such sum as you shall find from the evidence that he has sustained by reason of the construction and ordinary operation of the defendant's railroad along and adjacent to plaintiff's property. The items to be considered by you in making your estimate of damages are: The smoke, soot, and cinders which envelope or are thrown upon plaintiff's property or the necessary approaches thereto by passing engines; also the noise and jar of buildings caused by passing trains and engines, as well as the noise caused by ringing of bells, sounding of whistles of engines used on the road, while

it is also the inconvenience of ingress and egress to the property, if any, by being operated in an ordinary and proper manner proven. In short, you should consider every element arising out of the proper and ordinary operation of defendant's road that tends to diminish the value of plaintiff's property, so far as the same is shown by the evidence in this case.

"2. In estimating the plaintiff's damages in this case, if you should find from the evidence that he has sustained any by reason of the construction and operation of defendant's railroad as alleged in the petition, you are at liberty to take into consideration the fair market value of plaintiff's property as it was before the road was built and in operation and its fair market value after the road was built and in operation, and assess the plaintiff's damages at such sum as shall equal the difference between the two estimates, if you shall find there is any such difference, and in ascertaining the fair market value of the property you are not to determine that by what it would bring at forced sale or from one that might buy it for speculative purposes, but what a reasonably prudent and competent man would pay for it provided he wanted it where it is, and as it is, and for his own use, and was willing and able to buy."

Without commenting upon the rule announced in the instructions asked and refused, as to whether correct or not, it is clear that the true doctrine on the subject was fully and thoroughly stated in the charge of the court in relation to the questions involved, and consequently it was not error to refuse to give the instruction requested.

The court, at request of defendant, gave the following as a portion of its charge: "The mere fact

that plaintiff and his family may sometimes be annoyed or disturbed by sound or noise occasioned by the blowing of locomotive whistles, or the ringing of locomotive bells, or by the rattling or rumbling of passing engines and cars does not make out a case in his favor, if it is an annoyance suffered by plaintiff in common with all others who happen to reside or be in the vicinity of railroads." It appears from the record that the trial court modified the instruction as originally prepared and tendered, but in what particular the record does not disclose, but as modified it was given. The plaintiff contends that the instruction was erroneous and misleading, in that it confined consideration to those who "may happen to reside or be in the vicinity of railroads," instead of, as it should, extending it to include the general public. We need not now determine whether the instruction is open to the objection urged against it. If it be conceded, for the sake of argument, that it is so, its only application could be to the question of whether the plaintiff had suffered any damages or not, and this question the jury solved in his favor. The instruction under discussion, it is very evident, could in no manner affect the jury in determining from the evidence the market value of the property before and after the building and commencement of the operation of the railway, and hence could not have prejudiced the plaintiff. It follows that the judgment of the district court must be

AFFIRMED.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA V. E. C. GORSUCH.

FILED APRIL 7, 1896. No. 6115.

1. **Railroad Companies: DAMAGES FOR KILLING LIVE STOCK: NEGLIGENCE.** Evidence examined, and *held* to present a question of negligence on the part of the defendant in the action, for the determination of the jury, and to support their finding on such question.
2. **Instructions: HARMLESS ERROR.** The giving of an instruction which is not applicable to the issues or evidence in a case does not call for a reversal of the judgment when no prejudice resulted to the rights of the complaining party.
3. ———: **NEGLIGENCE.** The refusal of the trial court to give certain instructions requested by plaintiff in error, examined and *held* not erroneous.
4. ———: **HARMLESS ERROR.** Where, in the trial of a cause, instructions are given which in substance are objectionable and some of which are in conflict, but it appears that the jury were not misled thereby and no prejudice resulted to the rights of the complaining party, there is not sufficient cause for a reversal.

ERROR from the district court of Adams county.
Tried below before BEALL, J.

J. W. Deweese and Dilworth & Smith, for plaintiff in error.

Tibbets, Morey & Ferris and S. H. Smith, contra.

HARRISON, J.

The defendant in error instituted this action in the district court of Adams county to recover of plaintiff in error damages alleged to have accrued to defendant in error by reason of the agents and

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employees of plaintiff in error so negligently running one of its trains on and over its road and track as to kill, or cause to be killed, one dark brown horse which belonged to defendant in error, of the value of \$125. The petition in the case was based upon the statutory liability of the company for injury to live stock on its tracks or line of road, where there had been a failure to comply with the requirements of the statute in regard to building a fence on either side of its line of road, also in the negligent operation of one of the company's engines or trains. A trial of the issues resulted in a verdict in favor of defendant in error, and after a motion for new trial filed in behalf of the company was heard and overruled, judgment was rendered on the verdict. To obtain a review of the rulings of the court during the trial the company has prosecuted error proceedings to this court.

It is contended by counsel for the company that the action was one predicated upon whatever liability might have arisen from the failure of the company to fence its right of way, coupled with the other facts and circumstances incident to the occurrence which resulted in an injury to the animal—a horse—by which it was rendered entirely useless; and not because of any negligence of the employees of the company in the operation of its train. To determine this, and further whether it was error to submit the question of such negligence to the jury, a knowledge of some of the salient points of the testimony becomes necessary. Hence we will, as briefly as may be, state them. The engineer in charge of the engine pulling the train testified in part as follows:

A. Well, when I pulled over the junction switch at Kenesaw, I saw some horses on the track about a mile from Kenesaw; four or five. I think five. I pulled on up towards them and they moved up. They were below a crossing—a road crossing east of the road crossing, and when they came to the crossing they slowed up and let me run within about twenty-five or thirty rods. I gave the alarm then and the horses started and run on.

Q. Where did they start? Were they in the track?

A. Some of them were in the track and some beside the track. Two or three were in the track, but they changed.

Q. State what you did.

A. A mile from the crossing there is another crossing, and when they run up to that crossing I sounded the alarm again and they slowed up until I came within probably twenty rods again, and somewhere near a mile from that crossing is a bridge, so I held back and did not make any alarm or anything until they run into the bridge.

Q. How far was you from them when they run into the bridge?

A. About eighty rods.

Q. What is the condition of the track along there?

A. Well, there is in some places a little cut and in some places a small fill and other places are level. There is two road crossings between where I seen them.

He said further that he had the train under such control from when he sounded the stock alarm until he stopped near the trestle or bridge that he could have stopped at any time before

reaching or coming up with the horses, and in respect to the speed of the train said:

Q. About how fast was you running at any one time?

A. Oh, I run probably eight or ten miles an hour until I gave the alarm the first time.

Q. And from that on?

A. I run probably ten or twelve miles an hour after the horses crossed the crossing. They run pretty lively and got ahead quite a ways. I slowed and had to pull up again to catch up.
* * * I wasn't any closer than twenty rods and I think I could stop in that distance.

Q. You wasn't closer than twenty rods at any time?

A. Not until they got on the bridge.

He also said that he knew of the existence of the trestle or bridge, and its location.

Q. Did you come to any stop from the time you started the horses until they came into the bridge?

A. No, sir.

Q. Could you have come to a stop?

A. Yes, sir.

Q. Easily?

A. Yes, sir.

The testimony of the fireman agreed in the main with that of the engineer; also, in substance, did that of the conductor. The evidence on the part of the plaintiff tended to show that the train—a freight train—was running at about its usual rate of speed as the witnesses had noticed similar trains on this line at this particular place, and after pulling up near the horses, followed them along the track about ten rods behind them, for a distance of one mile or more, to where

there was a cut, and thirty or forty rods beyond the farther end of the cut was located a bridge; that at this end of the cut the track was almost level with the ground or land on either side; that there was a fill or embankment comprising the approach to the trestle, which, at the bridge, was four, six, or eight feet high; that the engine was about six or ten rods behind the horse which was hurt, when he ran or jumped on the trestle. We infer that the legs of the horse went down into the spaces between the timbers of the trestle, although there was no direct evidence to such effect. All agree, however, that the train was stopped just before it reached the bridge, and the trainmen and some passengers rolled the horse off the bridge and that one of his front legs was broken, which rendered him entirely valueless. There was no fence on either side of the track at the point where the horses went upon it, or any portion of it on which they ran, up to and beyond the bridge where the horse was injured. It seems clear that the testimony was mainly directed to an effort on the part of the defendant in error to prove the want of ordinary care on the part of the men running the train, or to show acts by them which, when taken in connection with all the surrounding circumstances, showed negligence to a degree which rendered the company liable for any injuries to the horse, and on the part of the company to combatting or controverting any such construction or belief, arising from the circumstances and acts which caused the injury to the horse. This being the theory upon which both parties tried the cause, the question of negligence or no negligence was, under the evidence adduced, one for determination by the jury. It was proper to

submit it to them and their answer to this question upon the evidence will not be disturbed.

Of the instructions prepared on behalf of the company and requested to be read to the jury, paragraphs 1 and 2 were as follows:

"1. The court instructs the jury that if they shall find that the horse of the plaintiff got on the track and became frightened and ran along the track and ran into a bridge and injured itself, and that neither the engine nor any part of the train struck the horse, then you will find for the defendant.

"2. The jury are instructed that the evidence in this case will not warrant you in finding a verdict against the defendant. You will therefore decide for the defendant."

The trial judge refused to give either of them and such refusals are assigned for error. It was not error to refuse the first, for the reason it entirely omitted the element of negligence of the parties operating the train, and hence was improper and erroneous. The second was a direction to find the issues for the company, and, as we have concluded there was testimony which raised questions for the consideration of the jury and which it was their province to answer, the second paragraph requested was wrong and the refusal of the judge to give it in the charge to the jury was correct.

The trial judge, at the request of defendant in error, gave an instruction to the jury in which there was quoted from the statute the statement of the liability to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers arising against railroad companies from the failure to build fences along the

sides of the track, followed by a further statement that if the jury ascertained from the evidence that the company had neglected to fence its tracks at or along the place stated in the petition setting forth the cause of action, and that the horse was there injured, killed, or destroyed by the agents, employes, or engines of the company, or by the agents, employes, or engines of any other company running over and upon the road, the company became liable. It is urged that this was erroneous, there being no evidence that the horse was injured or killed by the agents, employes, or engine of the company, except as it was claimed to have been because of the negligence of the employes in charge of the engine and train following the horse closely along the track for a long distance, into the cut, and through it and to the trestle beyond. The instruction was framed to apply to a case under the provisions of what is commonly known as the "fence law," and was only pertinent to the facts developed in this case in its reference to the failure of the company to build fences along the sides of its road; and to make it fully applicable in view of the issues and the theory upon which the case was tried, should have contained a further statement embodying the element of negligence as attributable to the parties in charge of the train and the manner in which it was handled or run at the time in question.

Instructions requested by counsel for the company and given were in the following terms:

"The jury are instructed that if the jury find that the horse got on the railroad track for want of a fence such as the law requires the company to erect and maintain to enclose its track, and while on or near its track is frightened by a passing

train and in its fright is injured by falling through a bridge on the line of the railroad, and no negligence or willful misconduct is chargeable to the agents of this company in charge of the train at that time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for the injury."

"The true meaning of sections 1 and 2 of chapter 72, Compiled Statutes, is that the injury to stock must be caused by the actual collision, that is, it must be done by the agents, engineers, or cars of the company, or the locomotive or trains of any corporation permitted and running over or upon the road, or the willful misconduct of the trainmen in the course of their employment, to make the company liable."

These were doubtless framed and presented by counsel for the company to meet and destroy any impression, erroneous or otherwise, which might have been created in the minds of the jury by the instruction on the same subject given at the request of the counsel for the opposing party, and if construed in connection with such instruction they might be said to have effected the purpose. If construed together, they announced the rule in favor of the company which prevails when the duty to build fences has been performed, that there must have been acts negligently or willfully done. But it may be said that the errors, if any, in this instruction requested by defendant in error in its statements of the law as applicable to the case on trial could not and were not cured by giving other and further instructions on the same subject, framed with a view and purpose of adding to the former and correcting its imperfections or

supplying its deficiencies. This would be within a well established doctrine with reference to instructions to a jury, but the jury were not misled nor the rights of the complaining party prejudiced by the giving of the instruction under consideration; hence there was no available error. (*Labaree v. Klosterman*, 33 Neb., 150.)

The instructions numbered 2 and 3 requested for defendant in error and given were excepted to by counsel for the company, and their giving is properly assigned as error. They were in regard to the duties of the parties in charge of the engine or train, to stop it after seeing the horses on the track, if, by so doing, the injury could have been avoided, and submitting to the jury the question of negligence in the running of the train at the time and place of the injury. The judge modified the paragraph of the instructions numbered 3, and as given it informed the jury that the finding should be for the company unless the employes were proven to have been guilty of negligence and willful misconduct. This was as favorable to the company as it could have been if it had been shown that it had fulfilled the requirements of the statute as to building fences along its track. These instructions, when viewed in connection with all the facts and circumstances of the case, are not open to any of the objections urged against them in the argument contained in the brief filed for the plaintiff in error.

Some of the instructions which were given, and to which objections were made and have been here urged, should probably not have been given in form and substance as they were, but the jury were not misled by them, nor did any prejudice result therefrom to the rights of the complaining

party. There was sufficient evidence to show a degree of negligence to render the company liable and to sustain the verdict of the jury. (*Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb., 247; *Indianapolis, B. & W. R. Co. v. McBrown*, 46 Ind., 229; *Missouri P. R. Co. v. Vandeventer*, 28 Neb., 112.) It follows that the judgment of the district court must be

AFFIRMED.

JAMES B. KITCHEN V. DELIA CARTER, ADMINISTRATRIX.

FILED APRIL 7, 1896. No. 5935.

1. **Negligence: CONSTRUCTION OF DANGEROUS BUILDINGS.** The owner of real property in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fall and do injury to an adjoining owner or the public.
2. ———: ———: **DAMAGES.** If a building falls because of defects in material and workmanship reasonably within the knowledge of the owner thereof, and thereby inflicts injury upon adjoining owners or their property or any person lawfully in its vicinity, the owner is liable for the damages ensuing therefrom.
3. ———: **CAUSE OF INJURY.** A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause.
4. ———: ———. The question of the proximate cause of an injury is one for the jury, but when their decision thereof is clearly and manifestly wrong it will be set aside.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

George E. Pritchett and *J. C. Cowin*, for plaintiff in error.

References: *Lewis v. Flint & P. M. R. Co.*, 19 N. W. Rep. [Mich.], 744; *Jucker v. Chicago & N. W. R. Co.*, 52 Wis., 150; *Pennsylvania Co. v. Hensil*, 70 Ind., 569; *Larson v. St. Paul & D. R. Co.*, 45 N. W. Rep. [Minn.], 1096; *Whitman v. Wisconsin & M. R. Co.*, 17 N. W. Rep. [Wis.], 124; *Pease v. Chicago & N. W. R. Co.*, 20 N. W. Rep. [Wis.], 908; *Fowler v. Chicago & N. W. R. Co.*, 21 N. W. Rep. [Wis.], 40; *Bernso v. Gaston Gas Coal Co.*, 27 W. Va., 285; *Childrey v. City of Huntington*, 12 S. E. Rep. [W. Va.], 536; *Marvin v. Chicago, M. & St. P. R. Co.*, 47 N. W. Rep. [Wis.], 1123; *St. Louis, A. & T. R. Co. v. Neel*, 19 S. W. Rep. [Ark.], 963; *St. Louis I. M. & S. R. Co. v. Commercial Ins. Co.*, 139 U. S., 223; *Ewing v. Pittsburgh C. C. & St. L. R. Co.*, 23 Atl. Rep. [Pa.], 340; *Herr v. City of Lebanon*, 24 Atl. Rep. [Pa.], 207; *Shaaber v. City of Reading*, 24 Atl. Rep. [Pa.], 692; *Deming v. Merchants Cotton-Press & Storage Co.*, 17 S. W. Rep. [Tenn.], 89; *Lynch v. Northern P. R. Co.*, 54 N. W. Rep. [Wis.], 611; *Nelson v. Chicago, M. & St. P. R. Co.*, 14 N. W. Rep. [Minn.], 360; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 101; *McGowan v. St. Louis Ore & Steel Co.*, 19 S. W. Rep. [Mo.], 200; *Keightlinger v. Egan*, 65 Ill., 236; *Beehler v. Daniels*, 29 Atl. Rep. [R. I.], 6; *Purcell v. English*, 86 Ind., 34; *McAlpin v. Powell*, 70 N. Y., 126; *Pittsburgh, F. W. & C. R. Co. v. Bingham*, 29 O. St., 364; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 372; *Larmore v. Crown Point Iron Co.*, 101 N. Y., 391; *Severy v. Nickerson*, 120 Mass., 306; *Omaha &*

R. V. R. Co. v. Martin, 14 Neb., 298; *Gibson v. Leonard*, 37 Ill. App., 344; *Woodruff v. Bowen*, 34 N. E. Rep. [Ind.], 1113.

Connell & Ives, contra.

References: *Hayes v. Michigan C. R. Co.*, 111 U. S., 228; *Mutual Ins. Co. v. Tweed*, 7 Wall. [U. S.], 44; *Baltimore & P. R. Co. v. Reaney*, 42 Md., 117; *Grimes v. Louisville, N. A. & C. R. Co.*, 30 N. E. Rep., [Ind.], 200; *Davis v. Garrett*, 6 Bing. [Eng.], 716; *Campbell v. City of Stillwater*, 32 Minn., 308; *Boss v. Northern P. R. Co.*, 49 N. W. Rep. [N. Dak.], 655; *Couts v. Neer*, 9 S. W. Rep. [Tex.], 40; *Village of Carterville v. Cook*, 22 N. E. Rep. [Ill.], 14; *Denver, T. & G. R. Co. v. Robbins*, 30 Pac. Rep. [Colo.], 263; *Houghkirk v. Delaware & Hudson Canal Co.*, 92 N. Y., 219; *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y., 526; Cooley, Torts [2d ed.], p. 367, and cases cited; *Gilbert v. Nagle*, 118 Mass., 278; *Welch v. McAllister*, 15 Mo. App., 492; *Indermaur v. Dames*, 1 C. P. [Eng.], 274; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass., 216; *Nickerson v. Tirrell*, 127 Mass., 236; *Low v. Grand Trunk R. Co.*, 72 Me., 313; *Smith v. Lambeth Assessment Committee*, 10 L. R., Q. B. [Eng.], 327; *Toomey v. Sanborn*, 146 Mass., 28; *Bennett v. Louisville & N. R. Co.*, 102 U. S., 577; *Learoyd v. Godfrey*, 138 Mass 315; *Gorham v. Gross*, 125 Mass., 232; *Hannem v. Pence*, 40 Minn., 127; *Shipley v. Fifty Associates*, 106 Mass., 194; *Khron v. Brock*, 11 N. E. Rep. [Mass.], 748; *Simmons v. Everson*, 26 N. E. Rep. [N. Y.], 911; *Wilkinson v. Detroit Steel & Spring Works*, 41 N. W. Rep. [Mich.], 490; *Bensen v. Suarez*, 28 How. Pr. [N. Y.], 512; *City of Anderson v. East*, 19 N. E. Rep. [Ind.], 726; *Hydraulic Works Co. v. Orr*, 83 Pa. St., 332; *Schilling v. Abernethy*, 112 Pa. St., 437; *Gramlich*

v. Wurst, 86 Pa. St., 80; *Gillespie v. McGowan*, 100 Pa. St., 149; *Lynds v. Clark*, 14 Mo. App., 74; *Glidden v. Moore*, 14 Neb., 84.

HARRISON, J.

The plaintiff in error, during the year 1886 and prior and subsequent thereto, was a part owner and had control of the premises known as the "Paxton Hotel property" in the city of Omaha. In 1886 the southwest portion of the building was what was called an "annex" to the main body of the building and this annex was fifty feet long, twenty-two feet wide, and two stories high. During the year stated the plaintiff caused an additional or third story to be built upon the annex. For this third story there were no plans and specifications made and no architect was employed to superintend its construction. A pencil sketch of the desired improvement was made and given by plaintiff in error to an experienced contractor and builder with directions to furnish the material and perform the labor, or have the necessary labor performed, the payment to be the reasonable value of the labor and material, or such sum as could be agreed upon between the parties. During the early part of the night of April 12, 1891, fire was discovered in the southwestern lower room of the annex, then being used as a kitchen. A fire-alarm was turned in and was promptly responded to by some of the organizations or companies belonging to the fire department, the members of which, as soon as they reached the premises, took active measures for stopping the fire. Some of them discovering, as they believed, evidences of fire in the upper northwest corner or room in the third

story of the annex, a ladder was raised from a vacant portion of an adjoining lot and placed so that the upper end reached or rested against the window sill of the room; and some of the firemen,—among them Michael J. Carter,—started up the ladder with a line of hose. They had proceeded but a short distance when a portion of the brick wall, against and by which the ladder was supported, fell outward and struck and injured the firemen who were upon the ladder. From the effect of injuries so received, Michael J. Carter soon afterward died, and this suit was instituted by Delia Carter, his wife and the administratrix of his estate, to recover damages under the provisions of our statute for the pecuniary loss resulting from his death. The right to recover in the action was predicated upon the alleged negligence of plaintiff in error in procuring or allowing the use of poor, inferior material in the building of the third story of the annex and its faulty and defective construction in certain particulars specifically designated in the petition. These statements all and singular of the petition in relation to negligence imputed to plaintiff in error and defects of any nature in the construction of the additional story to the annex, were denied in the answer. The result of a trial in the district court was a verdict and judgment in favor of defendant in error in the sum of \$5,000, and to secure a review of the proceedings in that court the case has been removed to this court by petition in error.

Counsel for plaintiff in error, in a reply brief, state, or assume it to be proven, that the deceased fireman was in or on the premises or building of plaintiff in error and was there a mere licensee,

and hence the plaintiff in error owed him no duty, and even conceding that negligence had been shown, yet no liability accrued. That a licensee, in entering upon property, assumes the risks of injury resulting to him from any defective, imperfect, or dangerous conditions of the premises, but this we need not discuss or decide as we do not think the question is raised by either the pleadings in the case or the facts. It was alleged in the petition that the fireman, when injured, was on a vacant lot adjoining the Paxton Hotel property, and the evidence discloses that he, with other firemen, went on the vacant lot first referred to, and reared a ladder against the hotel building, or more properly speaking, the annex, and was in the act of ascending it to go upon or into the building, when the brick wall fell on them and they were not in or on the premises of plaintiff in error. It was alleged in the petition that a part of the wall of the building,—the third story of the annex,—for no sufficient cause except its own defects and inherent weakness, fell westward and outward and injured the firemen. The theory of this portion of the cause of action was based upon the proposition that in erecting the building, the third story, if it was so defectively constructed, to the knowledge of the proprietor, as to be dangerous, and because of weakness it fell and injured anyone lawfully in its vicinity, or, as in this case, on the adjoining lot, the owner of the building was liable for any damage so suffered. Carter, the fireman, was lawfully on the adjoining lot. He had a right to go and be there for the purpose of fighting fire in this or any other of the buildings in that portion of the city. With regard to insecure build-

ings and liability attaching to the owners thereof it is said in Wood, Nuisances, p. 140, sec. 109, "While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous, by reason of the materials used in, or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom." (See authorities cited in support of the text.) "The owner of a building is not an insurer against accident from its condition, but so far as the exercise of ordinary care will enable him to do so he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it." (*Ryder v. Kinsey*, 64 N. W. Rep. [Minn.], 94.)

But it is urged by counsel for plaintiff in error that the evidence is insufficient to support a finding of defective construction of the third story of this building, and the falling as a consequence thereof; and further, that if it be conceded that the structure was not of the safest character, or was not safe, the proximate cause of the falling of the wall was the effect of the fire; that this was an intervening cause, and the immediate and principal one, and not within the reasonable contem-

plation of the proprietor of the premises when building or having built the third story to the annex, including the wall in question, or set in motion by him or arising from the construction of the wall or the manner of its erection; that he was not bound to foresee and so guard against any but natural and probable consequences,—things likely to follow his acts; or, in other words, the fire and the resultant falling of the wall, not being in any manner or degree connected with or referable to him or the construction of the wall, he was relieved from any liability for injuries caused thereby. It appears from the evidence that the portion of the wall which fell was of a side wall of a third story, which had been built during the year 1886, on the top of one of the walls of a two-story brick building theretofore built and existing; that the first story had what some witnesses called “a sixteen-inch wall,” and some a seventeen-inch. The second story had what was denominated “a twelve-inch wall,” and the third story, or new one, was an eight, or, as one witness called it, “a nine-inch wall.” The new wall was a twelve-inch one up to the top of the floor joists put in for the new or third story, then to its top—eleven feet—was an eight-inch wall. There were ceiling joists, two by eight and twenty-two feet long, put on sixteen inches apart, some of them anchored in a twelve-inch wall of the Paxton building, and all attached to or resting on it, and, at the other end, attached to or resting on the new wall, and fastened to some of them were iron anchors which extended through the new wall, and were bolted or appropriately fastened at the outer end—at the outer side of the wall. The roof timbers were 2x10 or 2x12 and at

one end were two feet or more above the ceiling timbers, and at the other rested on them or on a level with their upper edges, and both roof and ceiling timbers were connected or tied by a system of braces, on trusses. There were some partitions in the new or third story, one of which served, in part, to separate from the general space and form a room called, in the record, the "fire room," being the one from which the portion of the wall fell. This room, in size, was twenty-two by twenty-four feet six inches. This new wall reached to and overlapped a piece of new eight-inch wall on another building, known as the "Goodrich Building," some witnesses state, and some say made an abutting joint with it. It appears that they were not in line, and at this place, a number of witnesses say, the two walls were connected by spikes and pieces of iron. There is also evidence tending to show that they were not so joined. Mr. Whitlock, city building inspector, testified, and in so doing stated that "the west wall of the old building had sagged in toward the east. In running up the additional wall and making the third story, they kept carrying it over until they got a straight wall from the window. The result was it left an overhang of nearly half the thickness of the wall, which showed at the time the extent that was between the two windows. There was a bow in the wall." All the other witnesses who testified on this point stated that the old wall had bulged out and the new wall was drawn in instead of built out, or so as to overhang. All agreed in the statement that the brick used in building the wall were good, and this may be said to be established by the great weight of the evidence as to the mortar. Some of

the witnesses gave it as their opinion that the eight-inch wall was not a proper one to build; that it was not such a one as in their judgment should have been built there. The city inspector of buildings said in his judgment it was not a safe wall, but the preponderance of the evidence was to the effect that it was a properly built and safe eight-inch wall and proper in the position, under the circumstances, and for the use for which it was intended. In regard to the fire and the part it played, if any, in causing the wall to fall, the chief of the fire department and some of the firemen who were present at this fire testified to the effect that the most of the burning in this third-story room occurred after the falling of the wall, but the chief was asked the following question: "Q. Now, then, it had got up into the ceiling, between the ceiling and the roof, before the wall fell?" To which he answered: "A. Why, she must have."

The city building inspector was interrogated upon cross-examination and answered as follows:

Q. At the coroner's inquest were you asked this question, and did you make this answer. I am not now asking you with respect to the facts in the answer or the matters inquired of, but simply ask you whether you so testified at the coroner's inquest: "Q. So far as you can observe, there was nothing to indicate that the wall was hot, or that it fell out by reason of the heat?" To which you answered: "No, I think the ceiling joist, and that is what threw the wall over."

A. That is what I thought at the time.

Q. And that is the way you testified?

A. I presume that is the way I did, if it is down that way.

Q. And that was your theory,—that the fire burned off the ceiling joist? “The fire followed the steam pipes and came up in between the roof and the ceiling and of course shows there, now, to have burned the ceiling joist off, and as soon as they burned off it threw the wall out.”

A. That is what I said about that.

Q. Was this question asked you by Mr. Connell: “If that ceiling joist that burned and the wall fell in, can you account for the falling of the wall on any other theory except that the wall was of insufficient thickness and was not properly joined and connected together—can you account for it in any other way?” “A. I will say this, that the morning after the fire, that the ceiling joists, they were broken off, but whether they were burned off before the wall fell, I should judge, from the ceiling joists that were burned and remained there, that they must have burned before the wall fell.” Did you so testify?

A. I think so, about that way; it is a good while ago.

During re-direct examination:

Q. In reference to the burning of the ceiling joist, did you, at the coroner’s inquest, or do you now claim to have any personal knowledge as to when the burning of those joists occurred?

A. Well, it must have occurred before the fire, because the joists could not have burned in the position they were in. The part down in the ground, they must have burned before the wall fell.

Q. Have you any personal knowledge except merely that is your conclusion?

A. That is what I found the morning after the fire.

Q. Were you at the fire?

A. No, sir; I was not at the fire.

Q. You have not any personal knowledge as to how the burning actually took place?

A. I was not there to see it, of course.

It was shown that just where the wall fell a number of the ceiling joists had been entirely severed by the fire, and pieces of them were among the brick and mortar which fell to the ground. One piece was there with an anchor attached, and ends of these ceiling joists were also in the "fire room," on the floor, with anchors attached. The roof timbers were none of them entirely burned off, but were blackened or rather charred. We are not unmindful here of the argument of counsel for defendant in error, in part founded upon the supposition that the anchor attached to the piece of lumber which was found in the debris was one which had fallen with a piece of floor joist, and the further argument on this part of the case, in which they refer to the different theories advanced by the witnesses in reference to what caused the wall to fall. We must include, in any view we attempt to take of this subject, a few facts which were not controverted. The wall was placed there during the year 1886 and stood almost, if not quite, five years, and was, to all appearances, safe and fit for the uses to which it was put and to withstand the effects of use, time, and any ordinary tests to which it might be subjected, and, as stated by counsel for defendant in error in their brief: "There was the fact that the wall fell at the time of the fire, which was not disputed;" and in this connection we may add that there was the evidence, not contradicted, of the destruction by the fire of some of the means

which had been adjusted, some primarily and some secondarily, with the purpose to assist in retaining the brick wall in an upright position and make it safe. A careful review and analysis of the testimony leads us to the conclusion that it establishes that the fire and its accompanying facts and circumstances caused the falling of the wall. Whether or not, or to what extent, any inherent weakness or defect in the wall was a factor in bringing about such a result, is not very readily perceivable or answerable. However this may have been, Mr. Kitchen, in constructing or having constructed this third story of the wall thereof, had exercised such care that it had been and was safe, sufficient, and secure for any and all purposes or uses for which it was intended, and would not, from any inherent defects, fall and injure any person or persons passing it, or near it. It stood, in the condition in which it was made, for several years, and if the fire had not occurred, would no doubt have stood for years more. The fire did not have its origin in any act of the plaintiff in error, nor did it flow from or have its source in that wherein it is claimed he had been negligent, the erection of the wall. The fire was the immediate and dominant cause of the falling of the wall, and hence was the proximate cause of the injury.

But it is urged that what was the proximate cause was a question of fact for the jury, and their determination of it should not and will not be disturbed. Ordinarily, what is the proximate cause of an injury is, in any case where the question is involved, one of fact for the jury to determine; but where, as in this case, their decision of the question is manifestly wrong, it will be set aside. This is a case in which the sympathies are strongly

Stover v. Hough.

appealed to and enlisted, but justice and right must prevail and govern the course of the decision. On the facts and circumstances as they appear in the record, the judgment of the trial court must be reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES E. STOVER V. DAVID M. HOUGH ET AL

FILED APRIL 7, 1896. No. 6341.

1. **Summons: SERVICE BY PUBLICATION: PROCEEDING TO OPEN JUDGMENT: EVIDENCE.** To entitle a party, under the provisions of section 82 of the Code of Civil Procedure, to open a judgment rendered against him upon service by publication, it must appear that he had no actual notice of the pendency of the action in time to appear therein and make his defense. Should he fail to establish the want of such notice by a preponderance of the evidence, the motion to open the judgment must be denied, although all other requirements of said section have been complied with.
2. ———: ———: ———: ———. On the hearing of an application to open a judgment under said section 82, the adverse party may present counter affidavits to establish that the applicant had actual notice of pendency of the action a sufficient time before judgment to appear in court and make his defense.
3. **Trial to Court: INCOMPETENT EVIDENCE: HARMLESS ERROR.** A judgment will not be reversed merely for the admission of incompetent or irrelevant evidence in a cause tried to the court without a jury.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Andrew Bevins, for plaintiff in error.

Henry P. Stoddart and William E. Healey, contra.

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47	799
47	789
55	19
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47	789
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NORVAL, J.

This is a proceeding in error to review the action of the district court in refusing to open a judgment rendered therein against James E. Stover, upon service by publication alone. On the 4th day of October, 1888, David M. Hough and Charles P. Ford instituted an action in the district court of Douglas county against James E. Stover and Anna Stover, copartners as James E. Stover & Co., on an account for boots and shoes alleged to have been sold and delivered by plaintiffs to defendants. An order of attachment was issued on the ground of non-residence of the defendants, and certain real estate was attached. Service of summons was made in the cause by publication only, and the defendants made no appearance. The default of James E. Stover was entered by the court on May 2, 1889, and nine days later judgment was rendered against him and in favor of the plaintiffs in the sum of \$580.90, and it was further ordered that the attached property be sold. On the 21st day of June, 1892, James E. Stover filed a motion in said cause to open said judgment under the provisions of section 82 of the Code of Civil Procedure and permit him to defend. The motion was accompanied by an answer, consisting of a general denial of the allegations of the plaintiffs' petition, also the affidavit of Mr. Stover setting forth that no service of summons was had upon him except by publication, and that he had no actual notice of the pendency of the suit in time to appear and defend before such judgment was rendered against him. Notice of the motion was duly given to the plaintiffs, a hearing was had upon affidavits and counter-affidavits and

documentary evidence, and the motion was overruled by the court, which order is before us for review.

By section 82 of the Code of Civil Procedure, a party against whom a judgment has been rendered, upon service by publication merely, is entitled as a matter of right to have the judgment opened and be let in to defend, upon complying with the provisions of said section. The application must be made within five years after the entry of the judgment, and it must be made to appear that the defendant had no actual notice of the pendency of the action in time to appear in court and make his defense. The application in this case to open the judgment was timely made. The controverted question is whether Stover had actual notice of the pendency of the suit. Mr. Stover in his affidavit states positively that he had no such notice. Upon the hearing of the motion there were read the affidavits of William H. Duffield and E. G. McGilton. The former deposed, in effect, that prior to the month of October, 1888, affiant received a conveyance from the defendant Stover for certain real estate described in the affidavit by metes and bounds, being the same premises which were attached in this action; that in said month of October, or during November of the same year, which was after the publication of the summons, and more than five months prior to the date of the judgment, affiant had a conversation with defendant in the city of Chicago, during which "Stover stated to and informed the affiant that the real estate above referred to had been attached in a suit brought against him by Hough and Ford; and that the amount of the claim of said firm against him for which such suit was

brought was about \$500," and further, that such attachment proceedings had been commenced but a short time prior to the date of said conversation. E. G. McGilton deposed, substantially, that he is one of the attorneys herein; that in the month of April, 1889, about a week before the end of said month, he met Stover in the latter's place of business, located on Thirteenth street, between Harney and Howard streets, in the city of Omaha, and at that time and place deponent informed Stover of the pendency of this action against him, to which the defendant replied that he was aware of that fact, but that plaintiff would never be able to collect a dollar, for the reason that he, Stover, had nothing, and that the property seized under the writ of attachment did not belong to him, but to his father-in-law; furthermore, that the defendant in the same conversation admitted the validity of the account upon which suit was brought, and that he was individually liable for the payment thereof. James E. Stover testified in rebuttal that he is not acquainted with the said E. G. McGilton, and never conversed with him upon any subject, and that defendant did not commence business at the place in which McGilton stated the conversation occurred, nor in that vicinity until December 26, 1891. The defendant, in one particular,—namely, as to the time he commenced business on South Thirteenth street, in Omaha,—is corroborated by the testimony of two or more witnesses. The defendant, however, failed to deny having the conversation testified to by Mr. Duffield, which occurred in Chicago prior to the rendition of the judgment in question. While the evidence adduced on the hearing in the district court was conflicting, it was sufficient to

justify the finding that the defendant had actual notice of the pendency of the suit in ample time to have made a defense had he desired to do so. Having had such notice, the motion to open the judgment was properly denied. (*Merriam v. Gordon*, 20 Neb., 405.)

It is claimed the court erred in admitting in evidence the affidavits of Duffield, McGilton, and Healey. The section of the statute above referred to expressly provides that the adverse party, on the hearing of an application to open a judgment, may present counter-affidavits for the purpose of showing that the defendant had notice of the pendency of the suit in time to appear in court and make his defense. The affidavits objected to tended to prove that the defendant had actual notice of the pendency of the action, hence the court did not err in admitting them.

It is urged that there was error in admitting the transcript of the evidence of James E. Stover and Andrew Bevins, given in another action. A sufficient answer to the contention is that the hearing was to the court without a jury, therefore the admission of incompetent or irrelevant evidence is not reversible error. (*Enyeart v. Davis*, 17 Neb., 228; *Richardson v. Doty*, 25 Neb., 424; *Ward v. Parlin*, 30 Neb., 376.) Excluding the evidence which is made the basis of this assignment, there yet remained sufficient competent evidence to sustain the order of the court.

It is stated in the brief that more than six months after the suit was brought the plaintiff voluntarily dismissed it as to all the defendants except James E. Stover, and the judgment sought to be opened was not rendered in the original action, but is a judgment against James E. Stover

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personally. The record fails to disclose a voluntary dismissal as to any defendant. It is true judgment was entered against James E. Stover alone; yet if there was any error in rendering a judgment against one of the partners, conceding the action was against the firm and not the individual members thereof, it cannot be reviewed in this proceeding, since such judgment was pronounced more than one year before the cause was brought to this court. (Code, sec. 592.)

We discover no reversible error in the record, and the order is

AFFIRMED.

W. B. SCARBOROUGH V. MYRON N. MYRICK.

FILED APRIL 7, 1896. No. 6243.

1. **Proceedings in Error: TIME.** Proceedings in error may be commenced in the supreme court at any time within one year from the rendition of the judgment or decree, or final order sought to be reviewed.
2. **Sufficiency of Petition: REVIEW.** A motion for a new trial is unnecessary to present to this court the question whether the petition states a cause of action.
3. **Quieting Title: PLEADING.** The petition in an action to quiet title examined, and *held* to state a cause of action.
4. **Summons: SERVICE BY PUBLICATION: PROCEEDING TO OPEN JUDGMENT.** To entitle a party to have a decree rendered against him upon service by publication opened, under section 82 of the Code, it must appear that he had no actual notice of the pendency of the action in time to interpose a defense.
5. **Notice of Proceeding to Open Judgment: WAIVER.** Notice of an application, under said section, to open a judgment or decree must be given to the adverse party; but where such party appears and resists the application, it is a waiver of formal notice.

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58	594

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6. **Quieting Title: SERVICE BY PUBLICATION.** In an action to quiet title to real estate, service by publication may be made upon a non-resident defendant who cannot be summoned in the state.
7. **Summons: AFFIDAVIT FOR SERVICE BY PUBLICATION.** Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication. It is sufficient if such affidavit states that the defendant is a non-resident of this state, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in section 77 of the Code, in which constructive service is authorized.
8. ———: **SERVICE BY PUBLICATION: WAIVER OF DEFECTS: APPEARANCE.** Where a decree is rendered upon service had by publication, and the defendant subsequently files an answer to the merits, and asks to have the decree opened under section 82 of the Code of Civil Procedure, such appearance is a waiver of all defects and irregularities in the service.
9. **Names of Parties: ERRORS: WAIVER: APPEARANCE.** Except in actions specified in section 23 of the Code of Civil Procedure, it is bad pleading to describe the plaintiff or defendant by the initials only of his Christian name; but if so designated it is merely a misnomer, and if the defendant appears, or is personally served, and no objection on that ground is made in the trial court, the defect is waived.
10. ———: **JUDGMENTS.** In the absence of a showing to the contrary, it will not be presumed for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued.
11. **Service by Publication: DEFECTS: PROCEEDING TO VACATE JUDGMENT.** A decree rendered against a defendant upon service by publication alone, he having made no appearance in the cause, and the published notice requiring him to answer on or before a date anterior to the filing of the petition, instead of the third Monday after the completed service, as required by statute, may be set aside on motion of the defendant, as having been irregularly entered, under the provisions of section 602 *et seq.* of the Code of Civil Procedure. (*Wilkins v. Wilkins*, 26 Neb., 235.)

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ERROR from the district court of York county.
Tried below before WHEELER, J.

Sedgwick & Power, for plaintiff in error.

George B. France, contra.

NORVAL, J.

This action was instituted in the district court of York county on the 5th day of April, 1892, by Myron N. Myrick against W. B. Scarborough, to quiet the title to the real estate herein described, and to annul a certain contract entered into by and between them, by the terms of which the plaintiff agreed to convey, upon certain considerations, the southwest quarter of section 3, the southeast quarter of section 4, the northeast quarter, and the northeast quarter of the northwest quarter of section 9, and the west half of the northwest quarter of section 10, all in township 12 north, range 3 west, York county, Nebraska. Affidavit for substituted service of summons was made and filed, notice of the pendency of the suit was duly published, and, without any appearance on the part of the defendant, a decree as prayed was rendered against him on the 16th day of June, 1892. At a subsequent term of the court, to-wit, December 30, 1892, the defendant, through his attorneys, filed a motion to set aside said decree, accompanied with the affidavits of his attorneys in support thereof, and filed his answer in said cause. The application was heard upon affidavits, and also evidence taken by the oral examination of witnesses, which testimony is embodied in the bill of exceptions found in the record. The court refused to set aside the decree, and the defendant has brought the case into this court for review.

One of the grounds urged for a reversal is that the petition fails to state a cause of action. Plaintiff insists that the sufficiency of the petition cannot now be raised, since the cause was not docketed in this court within six months from the entry of the decree, and further, because no motion for a new trial was filed in the court below. The cause is not here upon appeal, but by proceedings in error. Therefore the defendant was not required to have the cause docketed within six months from the date of the decree. Proceedings in error may be commenced in this court at any time within one year from the rendition of the judgment, or decree, or final order sought to be reviewed. (*Bemis v. Rogers*, 8 Neb., 149; *Rogers v. Redick*, 10 Neb., 332; *Hendrickson v. Sullivan*, 28 Neb., 790.) The record discloses that the transcript and petition in error were filed in this court on June 14, 1893, which was less than a year after the decree was pronounced in the district court. No motion for a new trial was necessary to test in this court the sufficiency of the petition. (*Hays v. Mercier*, 22 Neb., 656; *O'Donohue v. Hendrix*, 13 Neb., 255; *Schmid v. Schmid*, 37 Neb., 629; *Hansen v. Kinney*, 46 Neb., 707; *Harris v. State*, 46 Neb., 857.)

It is insisted that the petition does not state a cause of action, and is therefore insufficient to support the decree, because it fails to allege that plaintiff was the owner of the lands in controversy at the time the action was brought. Undoubtedly a plaintiff must have title to, or claim an interest in, the real estate in order to maintain an action *quia timet*, but he is not required to allege and prove a fee-simple title; especially is this so where he is in possession of the property.

(*Brewer v. Merrick County*, 15 Neb., 180; *McDonald v. Early*, 15 Neb., 63; *Foree v. Stubbs*, 41 Neb., 271.) In the case at bar the petition alleges "that the plaintiff was, at the time of the making and execution of the contract hereinafter mentioned [the one he sought to have canceled], the owner, and is now, and has been for more than five years last past, in the possession" of the premises in controversy. There is no averment in the pleading attacked that plaintiff has ever parted with the title in the property which he at one time held, and, at least after decree, we must presume that plaintiff continued to be the owner of the property when this suit was brought. Manifestly this is so, since the plaintiff alleges the making of the contract to convey the property to the defendant, and that the latter has wholly failed and refused to perform the conditions and stipulations therein contained on his part to be kept and observed, thereby showing affirmatively that the defendant has forfeited all rights or interest which he may have had in the contract and lands therein described. While the petition is not as full in its averments as might be desired by some pleaders, yet we think, under the liberal rules of code pleading, it states a cause of action.

One of the grounds stated in the motion to set aside the decree and permit a defense to be made is that there was no other service of summons upon the defendant than by publication. Under section 82 of the Code of Civil Procedure a party against whom a judgment or decree is entered upon constructive service alone, has a right to have such judgment or decree opened any time within five years by complying with the several requirements of said section, two of which being

that the party shall give notice of his application to his adversary, and also establish that the defendant had no actual notice of the pendency of the suit in sufficient time to appear in court and contest the cause. This record fails to disclose that notice of the motion to open the decree was served upon the plaintiff. It does, however, show that he appeared and resisted the application, which was a waiver of formal notice. The evidence adduced on the hearing fails to establish that the defendant did not have actual notice that the suit was pending. It follows that the defendant was not entitled to have the decree opened under said section 82. (*Merriam v. Gordon*, 20 Neb., 405; *Stover v. Hough*, 47 Neb., 789.)

It is urged that the trial court did not acquire jurisdiction on account of alleged defects in the affidavit for publication and in the published notice. It is true that the affidavit upon which constructive service of summons was based is jurisdictional, and if there is an entire omission of an averment upon a vital or material matter, the court will not acquire jurisdiction by the published notice, but the proceedings will be absolutely void. The affidavit must disclose, in addition to the fact that the defendant is a non-resident of this state, and service cannot be had upon him therein, that the action is one of those mentioned in section 77 of the Code, in which constructive service can be made. Tested by this rule the affidavit for publication in the case at bar is sufficient. It states the date of the filing of the petition against the defendant, that the object and prayer of the petition is to declare an agreement entered into between plaintiff and defendant on February 26, 1890, to be null and void, to cancel

the same of record, and to quiet in plaintiff the title to certain real estate specifically described in said contract, as in the petition set forth, and that the defendant is a non-resident of the state and service of summons cannot be made upon him therein. It was not necessary that the affidavit should disclose plaintiff's title to the property in controversy. He was not required to state his cause of action in the affidavit, but in his petition. (*Grebe v. Jones*, 15 Neb., 312.) The affidavit shows that the nature or the character of the suit is one in which the statute authorizes service by publication to be had, and that is sufficient so far as that point is concerned. (*Fouts v. Mann*, 15 Neb., 172; *Taylor v. Coots*, 32 Neb., 30.) Our statute authorizes service by publication in actions to quiet title to real estate when the defendant is a non-resident. (*Arndt v. Griggs*, 134 U. S., 316.)

Another complaint is that in the petition, affidavit, and notice of publication the defendant is designated by his family or surname, and the initial letters only of his Christian name. The statute contemplates that the parties to a suit, whether plaintiff or defendant, shall be described in the pleadings by their full Christian names, except in actions specified in section 23 of the Code. In all other cases it is bad pleading to describe the plaintiff by the initials only of his Christian name. But the absence of his first or Christian name amounts merely to a misnomer, and if objection on that ground is not made in the trial court, it will be waived. (*Walgamood v. Randolph*, 22 Neb., 493; *Real v. Honey*, 39 Neb., 516; *Laws v. McCarty*, 1 Handy [O.], 191; *Wilson v. Shannon*, 6 Ark., 196; *Monroe Cattle Co. v. Becker*, 147 U. S., 47; *Kenyon v. Semon*, 45 N. W. Rep. [Minn.],

10.) In the case at bar the defendant is sued by the name of W. B. Scarborough, no other description being inserted in the petition or proceedings; nor in the verification of the petition is it stated that the real name of the defendant is unknown. Neither in the answer filed by the defendant, nor in the motion and affidavits filed by him, has he disclosed his full Christian name. The defendant signed the contract sought to be canceled by his initials alone. We have carefully examined the entire record and find it nowhere discloses that the defendant has any other Christian name than the initials by which he was sued. This being true, we cannot presume that he had any other Christian name; therefore the objection that the defendant was described in the petition by his initials is not available in this court. (*Oakley v. Pegler*, 30 Neb., 628; *Fewlass v. Abbott*, 28 Mich., 270; *Kenyon v. Semon*, 45 N. W. Rep. [Minn.], 10.)

It is, however, argued that service by publication conferred no jurisdiction; in other words, that the summons should have been personally served upon the defendant. Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words, 'real name unknown,' and a copy thereof must be served personally upon the defendant." This section was before the court in *Enewold v. Olsen*, 39 Neb., 59. It was there held,

in an action to recover a personal judgment not brought under section 23 of the Code, where the defendant was sued as F. Olsen, "full name unknown," and the return on the summons showed that he was served by leaving a copy at his usual place of residence, that the court acquired no jurisdiction over the defendant, and that the judgment was void. The scope of this decision is that a personal judgment cannot be rendered when the defendant is sued by his initials, unless the summons is personally served upon him, or he appears, except in cases brought under said section 23. Whether in an action *in rem*, and in which no personal judgment is sought, service by publication can be had where the defendant is sued by the initials of his Christian name, it is unnecessary to decide, since, if there was any defect in the service in this case, it was waived by the defendant filing his answer to the merits and asking to have the decree opened under section 82 of the Code. (*Warren v. Dick*, 17 Neb., 241; *Seely v. Boon*, 1 N. J. Law, 138.)

Objection is made to the published notice. The proof of publication shows that the notice was published four consecutive weeks in the *York Republican*, the first publication thereof being on April 5, 1892, and the last insertion on the 29th day of the same month. The notice to the defendant required him to answer the petition on or before the 16th day of March, 1892, which was not only prior to the first publication, but before the petition was filed in the district court. By statute the time for filing answer is fixed "on or before the third Monday * * * after the return day of the summons or service by publication." The notice in question is manifestly defective. It

should have required the defendant to answer on or before the third Monday after the completed service. The defect indicated did not invalidate the notice to such an extent as to prevent the court from acquiring jurisdiction or to render the proceedings absolutely void. It was a mere error or irregularity not available in a collateral attack upon the decree, but constituting sufficient ground for a reversal in a direct proceeding like this, or to set aside the decree under the third subdivision of section 602 of the Code, which authorizes a district court to vacate its own judgments or decrees after the term at which the same were entered "for mistakes, neglect, or omissions of the clerk, or irregularity in obtaining a judgment or order. (*Wilkins v. Wilkins*, 26 Neb., 236.)

The case cited was an action for divorce, in which a decree was rendered against the defendant. Service was by publication only, the notice requiring the defendant to answer on the second Monday, instead of the third, after the last publication. Nearly three years after the rendition of the decree the defendant filed a motion in the same court to vacate the decree for said defect in the notice in fixing the time for answer, which motion was sustained, and the ruling was subsequently affirmed by this court. The decree in the case at bar was irregularly entered, and it should have been set aside. The decree, and the order refusing to vacate the same, are reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

PHILADELPHIA MORTGAGE & TRUST COMPANY,
TRUSTEE, v. PETER GOOS ET AL.

FILED APRIL 7, 1896. No. 8250.

1. **Mortgages: RENTS AND PROFITS: RECEIVERS.** Although section 55, chapter 73, Compiled Statutes of Nebraska provides that "in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof," yet it does not abrogate the power of the court to appoint a receiver, in a proper case, to collect the rents and profits from mortgaged premises, notwithstanding the mortgage contains no stipulation as to the right of possession.
2. ———: ———: **APPOINTMENT OF RECEIVER PENDING APPEAL.** After a confirmation of sale of mortgaged premises, and an appeal from such order by the defendant, the trial court may, in a proper case, when necessary to protect the mortgagee's interests, appoint a receiver to collect the rents pending the determination of such appeal.
3. ———: ———: **RECEIVERS.** *Chadron Banking Co. v. Mahoney*, 43 Neb., 214, distinguished.
4. ———: ———: ———. In an action to foreclose a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect the rents, when it is disclosed that the mortgaged property is "probably insufficient to discharge the mortgage debt." *Jacobs v. Gibson*, 9 Neb., 380, followed.

ERROR from the district court of Douglas county. Tried below before AMBROSE, J.

The opinion contains a statement of the case.

Wharton & Baird, for plaintiff in error:

The appeal by Iszard from the decree of the district court and the filing of his bond did not divest the district court of power to hear the application and appoint a receiver. (*Pasco v. Gamble*, 15 Fla.,

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562; *Connelly v. Dickson*, 76 Ind., 440; *Schreiber v. Carey*, 48 Wis., 217; *Mitchell v. Roland*, 63 N. W. Rep. [Ia.], 606; *Stockman v. Wallis*, 30 N. J. Eq., 449; *Chetwood v. Coffin*, 30 N. J. Eq., 450; *Eastman v. Cain*, 45 Neb., 48.)

Under the law of Nebraska, except as otherwise provided, the mortgagor is entitled to the rents and profits and the possession of the mortgaged property until the final confirmation of the sale. (Compiled Statutes, sec. 55, ch. 75; *Yeazel v. White*, 40 Neb., 432; *West v. Conant*, 34 Pac. Rep. [Cal.], 705; *Swan v. Mitchell*, 47 N. W. Rep. [Ia.], 1043; *American Investment Co. v. Farrar*, 54 N. W. Rep. [Ia.], 361.)

After the decree had been entered, the sale confirmed, and the order of confirmation superseded by the appeal bond, the court had no power to appoint a receiver pending the appeal. (Code of Civil Procedure, sec. 266; *Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)

The supersedeas bond provides for payment of waste. It therefore protects the plaintiff against unpaid taxes. (*Phelan v. Boylan*, 25 Wis., 679; *Wilkinson v. Wilkinson*, 59 Wis., 557; *Stetson v. Day*, 51 Me., 434; *Cannon v. Barry*, 59 Miss., 289; *Mehle v. Bensel*, 2 So. Rep. [La.], 202; *Sherrill v. Connor*, 12 S. E. Rep. [N. Car.], 588.)

Cowin & McHugh, contra.

NORVAL, J.

This is a proceeding in error to review the order of the district court refusing to appoint a receiver to collect the rents and profits of the mortgaged premises, pending an appeal to this court from an order confirming a sale. On the 23d day of June, 1894, a decree of foreclosure of the mort-

gaged premises was entered in the district court of Douglas county in favor of the plaintiff for the sum of \$72,678.66, with interest on \$67,000 at seven per cent, and ten per cent interest on the remainder of the amount found due by the decree. The defendant, John E. Iszard, in due time filed a written request for a stay of the order of sale for the period of nine months. Subsequently, on the 29th day of March, 1895, an order of sale was issued, the premises were appraised, and the sale thereof advertised to take place on April 30, 1895. On motion of the defendant Iszard, the appraisement was set aside by the court; a second appraisement of the property was made by new appraisers, which likewise was vacated on motion of Iszard, and a third appraisement was ordered. The premises were again appraised by other appraisers, and advertised for sale. A motion to set aside this appraisement and to remove the special master commissioner was filed by Iszard, but the same was not heard or passed upon until after the day fixed for the sale of the real estate. The property was sold under the appraisement to the plaintiff for \$68,100. Iszard filed objections to the sale, which, with his motion to set aside the appraisement and to remove the special master commissioner, were overruled, and the sale confirmed August 31, 1895. Thereupon Iszard prosecuted an appeal to this court, giving a supersedeas bond in the sum of \$7,000, conditioned for the prosecution of such appeal without delay, and that during the pendency of said appeal he would not commit, or suffer to be committed, any waste upon the mortgaged premises. Subsequently, on the 30th day of September, 1895, plaintiff filed its petition for the appointment of a receiver to col-

lect the rents, issues, and profits pending the appeal, setting forth in the application, in addition to the foregoing facts, that the appeal was prosecuted for delay merely; that the amount due plaintiff on his decree was \$79,455.45; that the value of the property is insufficient and grossly inadequate to satisfy said sum; that the defendants have failed and neglected to pay the taxes due and delinquent on said premises; that the accrued taxes and assessments, for which the property is liable, and which the defendants have failed to pay, amount to about \$3,300, and that they have neglected to keep the property insured, and the plaintiff, for the protection of its security, has been compelled to pay for premiums and insurance on said property, since the rendition of the decree of foreclosure herein, the sum of \$1,867.06. Notice of the petition was duly given, and upon the hearing the application was denied and a receiver refused. A motion for a new trial was filed by the plaintiff, which was overruled. The district court of Douglas county had jurisdiction to hear and determine the application for the appointment of a receiver herein, notwithstanding such application was not made until after the decree of foreclosure had been entered, the sale confirmed, and the cause appealed to this court. (*Eastman v. Cain*, 45 Neb., 48.)

There is no controversy over the facts in this case; but the question is whether sufficient facts existed at the time the application was presented to the court below to authorize the appointment of a receiver. Section 266 of the Code of Civil Procedure provides for the appointment of a receiver in either of the following cases: "Second—In an action for the foreclosure of a mortgage,

when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third—After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or preserve it during the pendency of an appeal. * * *

Fifth—In all other cases where receivers have heretofore been appointed by the usages of courts of equity.” It is obvious the application for a receiver was not made to carry the decree of the district court into effect, nor to dispose of the property according to the decree. That had already been done. The second subdivision of section 266 of the Code authorizes the appointment of a receiver in an action to foreclose a mortgage when the mortgaged property “is probably insufficient to discharge the mortgage debt.” In other words, the inadequacy in value of the premises to pay the mortgage lien thereon is alone sufficient ground to entitle the mortgagee to the appointment of a receiver to take charge of the property and collect rents accruing therefrom. (*Jacobs v. Gibson*, 9 Neb., 380; *Ecklund v. Willis*, 42 Neb., 737.)

Our attention has been called to section 55, chapter 73, Compiled Statutes, which provides: “In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof.” It is argued that, under the foregoing provision, the mortgagor, except as otherwise stipulated in the mortgage, is entitled to the rents and profits, and the possession of the mortgaged premises until final confirmation of the sale. The mortgage under which the foreclosure in this case was made is not before us; hence we are not advised of its pro-

visions. Assuming that it contained no stipulation as to the right of possession of the property, it does not follow that a receiver may not be appointed to collect the rents and profits, in case the premises are insufficient in value to satisfy the lien of the mortgage. That such power exists was held by this court in *Jacobs v. Gibson*, 9 Neb., 380. LAKE, J., speaking for the court in that case, said: "In the absence of an agreement to the contrary, we suppose no one would contend but that a mortgagor is entitled to the rents and profits of mortgaged premises until condition broken,—or, in other words, until such time as the mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of his debt. Such, doubtless, is the law. On the other hand, it is equally clear that on a condition broken, by which the mortgagee is authorized to commence foreclosure proceedings, if the property be inadequate security, he has thenceforward an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings." (See *High, Receivers*, sec. 666; *Schreiber v. Carey*, 48 Wis., 208; *Pasco v. Gamble*, 15 Fla., 562; *Mahon v. Crothers*, 28 N. J. Eq., 567; *Hyman v. Kelly*, 1 Nev., 179; *Lowell v. Doe*, 44 Minn., 144.) The last case cited was an appeal from an order appointing a receiver of mortgaged real estate pending foreclosure proceedings. It was urged that under a statute of Minnesota which declares that "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," the court had no power to appoint

a receiver to dispossess the mortgagor. The court overruled this contention, saying, after quoting the foregoing section of the statute: "The mortgagee is no longer entitled to the possession of the mortgaged premises before foreclosure by reason of his having any title or estate in the land. The mortgagor having the legal title, may without doubt remain in possession until his title is divested, unless, in the application of the established principles of equity, and consistently with the legal title remaining in the mortgagor, the court shall find it necessary to lay its hand upon the property for the protection of the equitable rights of the mortgagee. The exercise of this power by courts of equity in the past was not based upon the ground that the legal title had passed from the mortgagor to the mortgagee, but upon the equitable rights of the mortgagee to have his security preserved so that it should be adequate for the satisfaction of the mortgage debt. * * * The jurisdiction of equity in the appointment of receivers, long exercised upon grounds peculiar to courts of equity, is not to be deemed to have been taken away by the statute unless that is its necessary effect, or at least its obvious purpose. Such is not the obvious purpose or necessary effect of the statute. It is to be read in harmony with the existing principles of equity jurisprudence, if the intention to do away with the application of such principles is not manifest. * * * It is very clear from the language of this statute, the meaning of which is plain, precise, and impossible to be misunderstood, that it was intended to abrogate the common law doctrine that a mortgage created an estate upon condition in the mortgagee, which, upon default in

the performance of the condition, became absolute, entitling the mortgagee to recover possession. But the language of the act expresses no more than this; and it cannot be fairly construed as abrogating, also, the power of courts of equity to afford to mortgagees such remedies for the protection of their equitable rights as, upon equitable grounds, those courts had always been accustomed to afford, and the granting of which did not rest upon the doctrine of the legal title or right of possession being in the mortgagee?" The reasoning is sound, and is equally applicable to our statute. We might cite many other cases to the same effect. Indeed, the general current of authority sustains the exercise of the power to appoint a receiver to collect rents of mortgaged premises in a proper case, though there is no stipulation in the mortgage giving the mortgagee the right of possession of the property. The case of *Yeazel v. White*, 40 Neb., 432, is plainly distinguishable, and not in the least in conflict with the foregoing authorities. There are decisions rendered under statutory provisions similar to ours which deny the power of a court to appoint a receiver to collect the rents, in the absence of such a stipulation in the mortgage. While we entertain the greatest respect for the opinions of the courts asserting the doctrine last stated, we are satisfied the reasons advanced in them are insufficient to justify us in overruling our prior adjudication on the question, especially since it is in line with the general authority in this country.

It is insisted that no power exists to appoint a receiver after decree under the second subdivision of said section 266, but that it merely authorizes one to be appointed while the case is pending and

undetermined in the district court. The case of *Chadron Banking Co. v. Mahoney*, 43 Neb., 214, is cited by counsel to sustain this contention. That case lacks analogy. There the petition in foreclosure prayed the appointment of a receiver to collect the rents pending the action, but no hearing was had on the application for receiver until the final decree was entered, when one was appointed, before an appeal was taken or an application was made for a stay of the order of sale. It was held, and, we think, rightly, there was no occasion for making the appointment, and the order was reversed. IRVINE, C., speaking for the court, observed: "But this order was made a part of the final decree; no appeal had been taken; no steps had been taken towards instituting an appeal. It is possible, though this we do not decide, that in some cases a receiver might be appointed pending a stay of execution, but no stay had been asked for. For all that appeared when this receiver was appointed, the mortgagees might have proceeded in twenty days (the time fixed for redemption) to sell the property." In the case at bar no application for the appointment of a receiver was filed or presented to the court until the defendant had prosecuted an appeal to this court from the order confirming the sale. The appeal had at that time been perfected, and a supersedeas bond given, so the plaintiff could not reap the benefit of the decree. When this application was made there existed sufficient reason why the appointment should be made. The property was insufficient to pay the mortgage, and there will be a large deficiency judgment. The cause was then pending and undetermined on appeal, and according to the rules and practice which obtain

in this court, such appeal could not be heard on its merits for two years. In the meantime the mortgage debt increases, the defendant collects the rents, amounting to \$5,000 per annum, which he pockets, and refuses to insure the mortgaged premises, or pay the accruing taxes against the property. It will be observed that section 266 of the Code does not provide when the application for a receiver may be made, whether before or after judgment, except that the third subdivision provides for the appointment of a receiver after judgment or decree, for certain purposes. As has already been stated, we have decided in *Eastman v. Cain*, 45 Neb., 48, that the district court possesses jurisdiction to appoint a receiver in a foreclosure case to collect the rents, although the application therefor is made after an appeal has been taken on the merits to this court. Had no appeal been prosecuted from the order of confirmation, doubtless a receiver could not be appointed merely to collect the rents; but an appeal having been perfected, the action must be regarded as still pending for the purpose of appointing a receiver of the rents and profits of the mortgaged property. (*Brinkman v. Ritzinger*, 82 Ind., 358; *Connelly v. Dickson*, 76 Ind., 440; High, Receivers, sec. 110; *Merrill v. Elam*, 2 Tenn. Ch., 513; *Moran v. Brent*, 25 Gratt. [Va.], 104; *Adkins v. Edwards*, 83 Va., 316; *Schreiber v. Carey*, 48 Wis., 208; *Beard v. Arbuckle*, 19 W. Va., 145; *Hutton v. Lockridge*, 27 W. Va., 428; *Astor v. Turner*, 11 Paige Ch. [N. Y.], 436.) The fact that the mortgaged premises are of insufficient value to pay the amount of plaintiff's claim, and costs, coupled with the further facts that the order confirming the sale may possibly be reversed, that the de-

fendant is collecting the rents and refuses to apply the same on the decree, or in payment of the taxes and assessments against the property, or to keep the premises insured, and the liability of the real estate being sold for the non-payment of said taxes, justify the appointment of a receiver. As was aptly said by Taylor, J., in delivering the opinion of the court in *Schreiber v. Carey, supra*: "We think the facts in this case show that the mortgagor, by his willful neglect in not paying the taxes, is casting a burden upon the mortgaged estate which equity demands he should discharge. It is clearly a want of good faith on the part of the mortgagor to neglect to pay the interest on the mortgage debt or to pay the taxes upon the mortgaged property, and yet remain in possession and appropriate all the profits of the use of the estate to his own purposes." The cases already cited fully sustain the right of the plaintiff to have a receiver appointed.

It is argued by the defendant that the plaintiff is protected against any possible damages by reason of the non-payment of the taxes, by the supersedeas bond given in the appeal taken from the order of confirmation. This bond is conditioned that appellant "will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate." Authorities are cited to the effect that non-payment of taxes constitutes waste. If we accept the reasoning of the decisions relied on by counsel, the defendant Iszard had committed waste upon the mortgaged premises, and it is clear that the commission of waste is sufficient ground to authorize a court of equity to appoint a receiver to take possession of the mortgaged property pending an appeal. Even

though the supersedeas bond is broad enough to cover the non-payment of taxes, which we do not determine, still that is no reason for refusing a receiver. The plaintiff is entitled to have his debt satisfied out of the property pledged as security for its payment, without being forced to resort to other remedies he may have. The statute authorizes the appointment of a receiver in an action of foreclosure when the mortgaged premises are "probably insufficient to discharge the mortgage debt." In the case at bar there is no room for doubt that the property is wholly inadequate to pay the amount of the decree. We must not be understood as holding that the plaintiff would be entitled to the rents and profits accruing from the property pending the appeal from the order of confirmation, in case such order should be affirmed. What we do decide is that the rents should be impounded and retained to await the further order of the lower court in the premises.

It was suggested on the argument that the real estate in controversy was Iszard's homestead. Whether in any case a receiver can be appointed to take possession of the mortgagor's homestead pending foreclosure proceedings is unnecessary to decide, since that question is not presented by this record.

The order refusing a receiver is reversed, and the cause remanded with directions to the district court to appoint some suitable person receiver to collect the rents and profits of the mortgaged premises.

REVERSED AND REMANDED.

MARY FITZGERALD, ADMINISTRATRIX, v. J. H.
• MCCLAY ET AL.

FILED APRIL 7, 1896. No. 6224.

1. **Contracts to Erect Public Buildings: BONDS: LIABILITY OF SURETIES.** P. and S. entered into a contract with the state to erect for it a building at a stipulated sum. The contract required, *inter alia*, that the contractor should pay for all labor performed or materials furnished, and a bond for the faithful performance of the contract was given. *Held*, That the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building.
2. **Action on Builder's Bond: PLEADING.** *Held*, That the petition states a cause of action.

ERROR from the district court of Lancaster county. Tried below before HALL, J.

A. G. Greenlee, for plaintiff in error.

Samuel J. Tuttle, contra.

NORVAL, J.

Thomas Price and J. N. Shoemaker, on the 4th day of March, 1889, entered into a written contract with the state of Nebraska, through the board of public lands and buildings, whereby they agreed to furnish all the labor and materials necessary for the construction of a brick building for an engine house on the grounds at the hospital for the insane at Lincoln, at the stipulated sum of \$11,000. One-half thereof was to be paid when the roof was on and the remainder when the building was fully completed. The contract contained this provision: "And it is further agreed

that the first party [Price and Shoemaker] will pay off in full all laborers and material-men for labor performed or materials furnished, so that each and every person connected with this contract may receive his just dues." At the time this contract was made a bond in the sum of \$11,000 for the faithful performance of the contract was executed to the state by Price and Shoemaker as principals, and J. H. McClay and P. H. Cooper as sureties, which was accepted and approved by the state. The bond contained the same conditions as those considered in *Sample v. Hale*, 34 Neb., 220, and *Hickman v. Layne*, 47 Neb., 177. This action was brought by John Fitzgerald against the principals and sureties upon the bond of indemnity already mentioned, to recover for materials furnished the contractors, Price and Shoemaker, and used by them in the construction of said building. The sureties interposed a general demurrer to the petition, which was sustained, and as to them the court dismissed the action. To reverse the judgment the plaintiff prosecutes error.

The petition alleges the execution and delivery of such contract and bond, and copies thereof are made parts of the pleading. It is also averred that in pursuance of said contract Price and Shoemaker purchased of plaintiff, for use in said building, 200,000 bricks at the agreed price of \$10 per thousand; that said bricks were sold, furnished, and delivered by plaintiff, and the same were used in said building; that no part of the purchase money has been paid, except the sum of \$1,400, and that there is due the sum of \$609, with interest at seven per cent from April 11, 1889; that by reason of the failure of said Price and Shoemaker to pay said bal-

ance according to the requirements and stipulations of said contract, the conditions of said bond have been broken, and the defendant sureties have become liable to the plaintiff for the full amount so due for said bricks. The demurrer was, doubtless, sustained upon the ground that the bond was given alone to protect the state, and that third parties could not avail themselves of the stipulations; but since that decision was rendered this court has frequently held, in suits brought on bonds given for the faithful performance of a building contract similar to the one before us, that a person furnishing labor or materials for the principal in such bond may maintain an action upon the bond to recover the price of such labor or materials. (*Sample v. Hale*, 34 Neb., 220; *Habig v. Layne*, 38 Neb., 743; *Doll v. Crume*, 41 Neb., 655; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Kauffman v. Cooper*, 46 Neb., 644; *Lyman v. City of Lincoln*, 38 Neb., 794.) The petition shows a breach of the conditions of the bond, and, tested by the rule laid down in the foregoing authorities, it states a cause of action against the sureties. The judgment will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GRANT GUTHRIE, TREASURER OF THE VILLAGE OF
HARRISON, v. STATE OF NEBRASKA, EX REL.
SCHOOL DISTRICT NO. 7, SIOUX COUNTY.

FILED APRIL 7, 1896. No. 6248.

1. **School Districts: INTOXICATING LIQUORS: LICENSE FEES.**
Moneys arising from a license granted by a village for the sale of intoxicating liquors belong to the school district in which such village is located, and must be applied to the support of the common schools in said district.
2. ———: ———: ———: **MANDAMUS.** *Mandamus* will lie to compel a village treasurer to pay such moneys to the proper school district, even before the expiration of the municipal year for which such license was issued.

ERROR from the district court of Sioux county.
Tried below before BARTOW, J.

H. T. Conley, for plaintiff in error.

C. H. Bane and *D. B. Jenckes*, contra.

NORVAL, J.

On the 1st day of May, 1893, the proper municipal authorities of the village of Harrison, in Sioux county, issued a license to one Isador Richsten to sell intoxicating liquors within the corporate limits of said village for the municipal year ending May 1, 1894. The applicant paid to Grant Guthrie, the respondent, as treasurer of said village, the license moneys required by ordinance, to-wit, the sum of \$500. The relator, School District No. 7, of Sioux County, is located and embraced within the corporation limits of said village of Harrison, and is the only school district located within the limits of said village. On May 12, 1893, the school

district demanded said license moneys from respondent, and upon his refusal to pay over the same an application for a *mandamus* was presented to the court below. From an order granting a peremptory writ the defendant prosecutes error.

Section 5, article 8, of the constitution of this state declares: "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." Frequently the foregoing provisions have been before us for consideration, and in an unbroken line of decisions it has been held that all moneys arising from licenses granted by cities or villages for the sale of intoxicating liquors, since the adoption of the present constitution, belong to the school district in which the municipality granting the license is situated, and must be appropriated exclusively to the support of the common schools in said district (*State v. McConnel*, 8 Neb., 28; *City of Hastings v. Thorne*, 8 Neb., 160; *School District v. Saline County*, 9 Neb., 403; *State v. Wilcox*, 17 Neb., 219); and where parts of more than one district are within the limits of the municipality issuing such license, the license moneys will be divided in equal parts between such districts. (*State v. Brodball*, 28 Neb., 254; *State v.*

White, 29 Neb., 288.) The constitution and these authorities alike settle the right of School District No. 7 to the moneys in controversy.

The only proposition urged by the respondent in opposition to the granting of the writ is that the license moneys do not belong to the school district as soon as paid into the village treasury and the license is issued, but that the licensee retains an interest in the unearned portion of the moneys, and hence the respondent would not be justified in paying the same to the relator faster than the money is earned. This argument is based upon the fact that this court has held that where a liquor license is canceled or revoked through no cause or fault of the licensee, he is entitled to a repayment *pro tanto* of the amount paid therefor for the unexpired term of the license. (*State v. Cornwell*, 12 Neb., 470; *Lydick v. Korner*, 15 Neb., 501; *State v. Weber*, 20 Neb., 473; *Chamberlain v. City of Tecumseh*, 43 Neb., 221.) With these cases we find no fault, but they are not applicable to the case under consideration. There is no claim here that Richs-ten's license has been annulled for any cause, nor has it been made to appear that there is even a remote possibility of its being canceled through any cause not the fault of the licensee. Had such a showing been made, it is probable that the court below, in the exercise of a sound discretion, would have denied the writ. We cannot anticipate that the license will be revoked. On the contrary, the presumption must be indulged that the license was legally granted, and that it will not be annulled. In case the respondent had paid the money to the relator, and the license had been subsequently revoked, the respondent would be protected. He would not be liable for the repay-

Abbott v. Barton.

ment of the money to the licensee. This was held in *Lydick v. Korner*, 15 Neb., 501. So soon as the respondent received the money and the license was granted, no appeal therefrom being taken, it was his duty immediately to pay the money over to the treasurer of the school district. The decision of the district court is

AFFIRMED.

LYSLE I. ABBOTT, APPELLANT, V. JOHN BARTON
ET AL., APPELLEES.

FILED APRIL 7, 1896. No. 6396.

Ruling on Demurrer: EXCEPTION: REVIEW. To secure a review of alleged error in sustaining a demurrer to a petition, an exception is indispensably necessary, even though the action is solely for equitable relief.

APPEAL from the district court of Saline county.
Heard below before HASTINGS, J.

Cowin & McHugh and *Abbott & Abbott*, for appellant.

F. I. Foss and *W. R. Matson*, contra.

RYAN, C.

This action was brought into the district court of Saline county by the appellant to enjoin the collection of a judgment rendered against him in the county court of Hall county. The appellee, John Barton, was made a defendant because as sheriff of Saline county he was, as alleged, about to levy an execution for the collection of the afore-

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said judgment upon the real property of the plaintiff, and Edward Hooper was made defendant because the said judgment was in his favor. The grounds upon which it was sought to prevent the enforcement of the aforesaid judgment were that it was rendered in favor of Hooper who was not the real party in interest; that service of the summons issued by the county court of Hall county had been made upon the appellant, who at that time was within and a resident of Douglas county, and that there was a defense to the collection of the note sued upon; wherefore, as plaintiff claimed, the county court of Hall county was without jurisdiction to render the said judgment. It is said, in argument, that a general demurrer was sustained to this petition, and that plaintiff having elected to stand thereon, his action was dismissed. This may be assumed to be true, though, as will hereafter appear, it is not very clear that a demurrer was overruled. There is, however, an insurmountable obstacle to our proceeding further in this matter, and that is, that to the ruling of the court no exception was taken. The journal entry first recites the submission of the demurrer to the court and immediately thereafter contains the following language: "On consideration whereof the court overrules said motion. Plaintiff not desiring to plead further, it is therefore considered by the court that the temporary injunction allowed herein be, and the same is hereby, dissolved, and this action is hereby dismissed, and that the defendants have and recover of and from the plaintiff their costs herein expended. Plaintiff gives notice of an appeal and the supersedeas bond is fixed at the sum of \$200." There may be an appeal from the judg-

Nelson v. Mills.

ment of the district court in an equity case, and in this court the review will be had upon the evidence introduced in the district court when properly preserved, but the requirement of an exception to a ruling, whereby a demurrer is sustained to the petition, is as indispensable in an equitable action as in an action at law. The judgment of the district court is

AFFIRMED.

NELSON & LITTLE V. W. H. H. MILLS.

FILED APRIL 7, 1896. No. 6467.

Conflicting Evidence: REVIEW. A judgment rendered on a verdict reached upon consideration of merely conflicting evidence will not be disturbed where there is presented on error proceedings no question other than the sufficiency of the evidence to sustain the verdict.

ERROR from the district court of Phelps county.
Tried below before **BEALL, J.**

J. R. Patrick, for plaintiffs in error.

Hall, St. Clair & Roberts, contra.

RYAN, C.

In this action in the district court of Phelps county the firm of Nelson & Little sought to recover judgment for goods sold W. H. H. Mills. The answer contained a general denial and a claim of set-off on account of merchandise sold to the plaintiff. By reply the right of set-off was put in issue, and on a trial of the issues joined there was a verdict in favor of the defendant,

upon and in accordance with which judgment was rendered for defendant in the sum of \$28.35 and costs.

The matter in this court specially contested is whether clothing of the value of \$19 sold by plaintiff to one Lindsey was properly charged to the defendant. There was evidence that Lindsey, when he purchased the aforesaid clothing, was in the employ of Mills, and that Mills directed that the clothes sold Lindsey should be charged to himself. In his testimony Mills explicitly denied that he ever gave any authority to charge against him the clothes purchased by Lindsey. The jury, on conflicting evidence, found in favor of Mills, and we cannot disturb this verdict. There was no assignment of error which can be considered independently of the mere tendency of the evidence to prove or disprove the liability of Mills for the clothes sold to Lindsey. There is no fault found with the instructions given, but it is complained that the jury ignored them. The question submitted by these instructions was whether the promise of Mills was one to answer for the debt of another or was an indebtedness contracted by Mills for clothes purchased for Lindsey. There is no complaint of the correctness of the principles stated in these instructions as applied to the evidence upon which the jury was required to act, but it is urged that the jury arrived at a conclusion which, in view of these instructions, they should not have reached. In brief, this argument is that the jury should have found that the promise of Mills was really to pay an indebtedness contracted by himself, and not that of Lindsey. This contention is, therefore, simply that the verdict was contrary to the weight of the evidence, and thus we are

brought back to the first proposition herein considered and held adversely to the argument of the plaintiff in error. The judgment of the district court is

AFFIRMED.

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**HORNICK, HESS & MOORE, APPELLANTS, V. MARTIN
MAGUIRE, APPELLEE.**

FILED APRIL 7, 1896. No. 6459.

1. **Review: JUDGMENTS: JOURNAL ENTRIES.** This court will not review a judgment rendered by the district court prior to the formal entry of such judgment upon the journal of the trial court. (*Ward v. Urmson*, 40 Neb., 695.)
2. ———: ———: ———. A memorandum of a judgment made by a judge of the district court upon his trial docket will not authorize a review thereof in this court before the extension of such judgment upon the journal of the district court, in apt language and in due form. (*Ward v. Urmson*, *supra*.)

**APPEAL from the district court of Cedar county.
Heard below before NORRIS, J.**

Miller & Ready and J. S. Lothrop, for appellants.

J. C. Robinson and Benjamin M. Weed, contra.

RYAN, C.

Appellants in their brief state that they brought suit in the district court of Cedar county to recover \$468.37, and that by virtue of a writ of attachment the sheriff levied upon and attached a small stock of drugs, the property of the defendant, of the estimated value of about \$1,000. It may be that these statements are true. It is un-

fortunate, if such is the case, that they were not evidenced by the record which begins with a copy of "An Inventory of, and Claim for Exemption," in support of which is found attached the affidavit of Martin Maguire. Following this affidavit is found an "Answer to Affidavit of Defendant for Exemption," verified upon belief. There is next found a transcript of what is denominated, "Trial Docket, Judge's Entries," from which it appears that the application for exemption was sustained, to which plaintiffs excepted, as they likewise did to an order overruling a motion for a new trial. The above facts shown by the "Judge's Entries," appear in the journal entry, in which, however, there is no final judgment. The entry of the presiding judge in his trial docket of the words "Judgt. for plaintiff for \$468.—On \$103.55, int. 10 per cent.—On \$364.52, int. 7 per cent," does not amount to and cannot take the place of a final judgment. (*Ward v. Urmson*, 40 Neb., 695; *Brown v. Ritner*, 41 Neb., 52; *Garneau v. Omaha Printing Co.*, 42 Neb., 847.) This proceeding is therefore

DISMISSED.

LITTLE, MAXWELL & COMPANY V. ROSS GAMBLE.

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FILED APRIL 7, 1896. No. 6484.

Costs: FINAL ORDER: REVIEW. A mere judgment for costs in favor of the defendant, in whose favor a verdict had been returned, without a final disposition of the cause in the district court, cannot be reviewed in the supreme court.

ERROR from the district court of Buffalo county.
Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Ross Gamble, pro se.

RYAN, C.

This action was brought by the firm of Little, Maxwell & Co. for the purchase price of certain goods of the value of \$469.20, and, upon a trial had in the district court of Buffalo county, there was a verdict for the defendant. Whether or not this verdict was justified by the proofs we cannot determine, for the record shows no final judgment. Just after the recitations showing the overruling of a motion for a new trial and the allowance of time to settle a bill of exceptions, the language of the final journal entry is as follows: "Defendant demands judgment on the verdict, and, in pursuance of the verdict rendered herein, it was ordered by the court that the defendant Ross Gamble recover of and from the plaintiff Little, Maxwell & Co. his costs herein expended, taxed at \$31. Judgment on the verdict." This was not a final disposition of the case in the district court. (*Nichols v. Hail*, 5 Neb., 194; *Gapen v. Bretternitz*, 31 Neb., 302; *Smith v. Johnson*, 37 Neb., 675.) The petition in error is, therefore,

DISMISSED.

ALBERT DAVISON V. LIZZIE B. CRUSE.

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FILED APRIL 7, 1896. No. 6412.

1. Witnesses: CONTRADICTORY STATEMENTS: IMPEACHMENT.

To impeach a witness by showing a statement at variance with that made at the trial, it is necessary to call attention to such inconsistent statement and inquire whether or not it was made by the witness at a time and place indicated.

2. Bastardy: CHASTITY OF COMPLAINANT: EVIDENCE.

Evidence of the unchastity of complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues presented for trial.

3. ———: EVIDENCE. The probable duration of the period of gestation is a question of fact to be shown by proper evidence in each particular case wherein that question is material.**4. ———: ———.** In bastardy proceedings a mere preponderance of the evidence is sufficient to sustain a verdict of guilty.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Winter & Kauffman and *A. D. McCandless*, for plaintiff in error.

John H. Grossman and *J. B. Sheean*, contra.

RYAN, C.

On May 5, 1892, plaintiff in error filed and caused to be docketed in the district court of Douglas county a certain transcript of appeal from a justice of the peace. By her information on oath, which was certified in said transcript,

Lizzie B. Cruse, an unmarried woman, on April 21, 1892, charged that she was then pregnant with a bastard child of which Albert Davison was the father. This cause, which was brought to the district court aforesaid, was therein continued till December 23, 1892, when it was called for trial. The defendant in the district court was found guilty as charged and was adjudged the putative father of the complainant's bastard child, and charged with its maintenance in the sum of \$2,088, payable in monthly installments of \$12 each, until said child should attain the age of fifteen years. To reverse these findings and the judgment of the district court the defendant has prosecuted error proceedings to this court. The questions presented will be considered in the order of their occurrence in the petition in error.

There is a recitation in the journal entry of date December 23, 1892, that a motion of Davison for a continuance was overruled, and of this ruling there is now a great deal of complaint in the brief submitted on his behalf. It is unfortunate that there is not in the record a copy of this motion and that the affidavit set out in the brief of plaintiff in error is to be found nowhere else than therein. It is equally unfortunate that no copy of the rules of the district court of Douglas county was offered in evidence that we might ascertain how far, if at all, there was ground for complaint as to the action of the court in setting the case for trial at the time, and on the particular docket, on which the order for trial was entered. There was in the record in the district court a copy of the statements of the evidence of Lizzie B. Cruse given before the justice of the peace in respect to the averments contained in the information sworn to

by her. This in the district court was not offered in evidence by either party.

The first error in the petition in error alleged to have occurred during the progress of the trial, was the refusal of the court to permit cross-examination of the complainant touching her evidence given before the justice of the peace. She was at the time under cross-examination as to the date when she first informed Davison that she was likely to become a mother, when counsel for the plaintiff in error asked her if she was positive it was on the 23d of September, and she answered she was. This answer was followed by the question: "Then why did you swear in the police court that it was not until the 1st of October?" To this question an objection was properly sustained for several reasons,—one of which was that there was in evidence nothing about a trial in police court; and another was that the question in no way tended to show that she did so testify in any court.

The next complaint in the petition in error is that the court refused to permit the defendant in the district court to introduce in evidence the cross-examination of Harry J. Hooper contained in his deposition. As to this offer plaintiff in error has quoted in his brief the following language from the record, to-wit: "The deposition of Harry J. Hooper is offered in evidence. The portions marked on the margin are excluded. Exception. The cross-examination is not read in evidence by the defendant, and after handing the deposition to counsel on the other side, and he refusing to read it, defendant offers to read that portion of the deposition which the court refused to allow the defendant to do, the part, being in

cross-examination." Upon this quoted part of the record it is urged that there affirmatively appear two errors,—one as to the portion of the direct examination excluded; the other as to the entire cross-examination. The part of the direct examination excluded was devoted to the reputation of Lizzie B. Cruse for chastity, during almost two years when she was for the most part a domestic in the hotel of the witness at Pawnee City, and to proof of improper conduct on her part. This period ended in September, 1891. It has been held by this court that evidence of unchaste conduct of the prosecutrix not confined to the probable period of gestation is incompetent. (*Masters v. Marsh*, 19 Neb., 458.) There was none of the direct examination excluded in which the misconduct of the prosecutrix was fixed more definitely than in "June, July, or August." The only proof submitted as to the length of the period of gestation was by the testimony of Dr. Nickles, who stated that it was about 280 days, and this witness also testified that the child of Lizzie B. Cruse was born on June 8, 1892. If we assume 280 days as the period of gestation, it could only extend back to the 1st of September, 1891, in this case; hence evidence of the unchastity of the prosecutrix anterior to this time, whether established by reputation or proof of specific acts, was irrelevant. Because of language of COBB, J., *arguendo*, in *Masters v. Marsh*, *supra*, the defendant in error's counsel say in their brief: "And the period of gestation, as fixed by law of this state, was limited to August 13 and September 30, 1891." Lest there may be misapprehension on this point, we most emphatically deny this soft impeachment. This is not a question of law. It is a question of fact

to be determined upon the evidence submitted in each particular case, and in this respect it is quite analogous to the existence of negligence as contributing to personal injuries.

The complaint as to the exclusion of the cross-examination of Mr. Hooper is in effect determined by what has been said as to the inadmissibility of the part of the direct evidence by which was called in question the chastity of Lizzie B. Cruse previous to September 1, 1891, for the cross-examination of Hooper was on this same line. It is urged that in admitting in evidence only the fourth interrogatory and answer thereto of the deposition of W. A. Spees there was error prejudicial to the plaintiff in error. The interrogatory and answer referred to which were read to the jury fixed the month's duration which W. A. Armstrong boarded at the hotel in Wymore in which the prosecutrix was a domestic as being in the months of August and September, 1891, and this was the only matter at all relevant in this deposition. The testimony of H. W. Crowe was with reference to the improper conduct of Lizzie B. Cruse in 1888, and it was therefore properly excluded under the rule already stated and applied.

Plaintiff in error requested the court to give instruction numbered 1, and the refusal to give this instruction was in the motion for a new trial assigned as error jointly with the refusal to give instruction numbered 2, asked by the same party to this litigation. The aforesaid instruction numbered 1 was in the following language: "You are instructed that the evidence of the plaintiff shows that she was not a resident of Douglas county, Nebraska, at the time this suit was commenced, and your verdict must therefore be for the defend-

ant." There was uncontradicted evidence that the complainant was, and had been, a resident of Douglas county since April 1, 1892. The complaint was filed with the justice of the peace April 21, 1892, and whether or not at that time she had a legal settlement in another county was immaterial. (*Clark v. Carey*, 41 Neb., 780.) This instruction was therefore properly refused, and this precludes an examination of instruction numbered 2 grouped with it by the motion for a new trial. There was at most conflicting evidence, and though the jury accepted as true that of the complainant, we cannot on that account alone say its verdict was without proper support. (*Robb v. Hewitt*, 39 Neb., 217; *Dukehart v. Coughman*, 36 Neb., 412.) The judgment of the district court is

AFFIRMED.

LOMBARD INVESTMENT COMPANY V. A. J. SNOWDEN ET AL., IMPLEADED WITH W. C. TILLSON, APPELLEE, AND A. B. SLATER, APPELLANT.

FILED APRIL 7, 1896. No. 6450.

Sufficiency of Evidence: REVIEW. This appeal involves only a question of fact. The record examined, and the conclusion reached that the decree of the district court is supported by sufficient evidence.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

Jones & Brome, for appellant.

Gaslin, Newman & Hallowell and *Warren Pratt*,
contra.

RAGAN, C.

The title of this case is the Lombard Investment Company against A. J. Snowden; but these parties have no interest in the matter in controversy here. The suit was brought by the Lombard Investment Company in the district court of Buffalo county against Snowden to foreclose a real estate mortgage. One A. D. Slater was made defendant, he having acquired Snowden's interest in the real estate previously mortgaged by the latter to the investment company. W. C. Tillson was also made a party defendant, and he filed a cross-petition and sought to foreclose a mortgage on the real estate described in the investment company's mortgage, claiming a lien subject to the lien of the investment company. Slater answered the cross-petition of Tillson, admitting the execution and delivery by his grantor, Snowden, of the mortgage sought to be foreclosed, but pleaded as a defense to Tillson's cross-action that the debt which it secured had been paid. Tillson had a decree as prayed and Slater appeals.

The record involves only a question of fact, namely, does the evidence support the finding of the district court that Tillson's mortgage had not been paid? The evidence is very unsatisfactory, and in some cases self-contradictory, but we are constrained to say that there is sufficient evidence in the record to support the finding of the district court, and its decree is therefore

AFFIRMED.

HARRY B. DAVIS V. CITY OF OMAHA.**FILED APRIL 7, 1896. No. 6460.**

1. **Municipal Corporations: STREETS: SIDEWALKS.** The fee of the streets of the municipalities of this state is vested in the municipalities themselves; and the sidewalks of the various municipal corporations are parts of the streets thereof.
2. ———: ———: ———. The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public, and no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty. *City of Omaha v. Jensen*, 35 Neb., 68, and *City of Beatrice v. Reid*, 41 Neb., 214, followed.
3. ———: ———: ———. The law does not make it the duty of a lot owner to build, maintain, or repair the sidewalks—being part of the streets—in front of his premises.
4. ———: ———: ———. A municipal corporation may employ such agency as it sees fit in the construction or repair of its streets and sidewalks, and may license or permit a lot owner to build or repair a sidewalk in front of his premises under its direction.
5. ———: ———: ———. A general permission or license given by a city to a lot owner to build or repair a sidewalk on his premises will continue until revoked by the city, either expressly or by such conduct on its part as authorizes an inference of revocation.
6. ———: **DEFECTIVE SIDEWALKS: DAMAGES: LIABILITY OF CITY.** If a lot owner be licensed by a municipal corporation to build a sidewalk in front of his lot, which walk it is the duty of the corporation to build and maintain, and in the performance of such work the lot owner negligently leaves an obstruction in the street which causes an injury, the city is liable therefor.
7. ———: ———: ———: ———: **NEGLIGENCE.** A municipal corporation may be liable for an injury caused by an obstruction placed in its streets by a mere trespasser, but to make it liable in such case it must be shown to have been guilty of negligence in the premises.

8. ———: SIDEWALKS: ORDER TO BUILD: OBSTRUCTIONS BY LOT OWNER: PERSONAL INJURIES: LIABILITY OF CITY. A municipal corporation notified a lot owner to construct a permanent sidewalk in front of his lot within a time specified and that in default of his so doing the corporation would build the walk and assess the cost thereof to the lot. The lot owner did nothing towards building the sidewalk within the time specified. Afterwards, without the knowledge or permission of the municipal corporation, the lot owner proceeded to build the walk and for that purpose on an afternoon deposited a number of flag-stones in the street opposite his lot and left them there without barriers or signals. The night following the afternoon of the deposit of said flag-stones a traveler was injured by coming in contact with them, and sued the municipal corporation for damages. *Held*, (1) That it was the duty of the municipal corporation, and not the duty of the lot owner, to build and maintain the sidewalk; (2) that the municipal corporation had the right to permit or license the lot owner to build the walk; (3) that the notice given by the municipal corporation to the lot owner to build the walk was merely a license or permission to him to do so in the time specified; (4) that the license given was not a general or continuing one, but conditioned and limited to the time therein fixed; (5) that the lot owner, in the construction of the walk after the license from the municipal corporation had expired, was not acting either as the agent, employe, or licensee of the municipal corporation, but was a mere trespasser in the streets; (6) that as the municipal corporation had no knowledge that the lot owner had done anything towards constructing the walk before the happening of the injury sued for, and as the evidence disclosed no negligence on its part in the premises, it was not liable for the injury.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

The facts are stated by the commissioner.

E. R. Duffie and John D. Howe, for plaintiff in error:

The city is directly responsible for the unsafe condition of the street. It was the duty of the

city to construct the sidewalk in front of the lot where the accident occurred. This duty could not be imposed upon the owner of the property. A public duty cannot be imposed upon a private citizen, and any ordinance or statute which seeks to reach such a result is unconstitutional. (Elliott, Roads & Streets, 539; *Noonan v. City of Stillwater*, 33 Minn., 198; *Gridley v. City of Bloomington*, 88 Ill., 554; *City of Keokuk v. Independent District of Keokuk*, 53 Ia., 352; *City of Cincinnati v. Stone*, 5 O. St., 38.)

The city was negligent in not discovering the dangerous condition of the street and providing means to warn the public of such dangerous condition. (*Pettengille v. City of Jonkers*, 116 N. Y., 558; *Glasier v. Town of Hebron*, 131 N. Y., 447; *Brusso v. City of Buffalo*, 90 N. Y., 679; *Detroit & M. R. Co. v. Vansteinburg*, 17 Mich., 99; *City of Beatrice v. Reid*, 41 Neb., 214.)

W. J. Connell and E. J. Cornish, contra.

In reply to the first contention of plaintiff in error reference was made to the following cases: *Hill v. City of Boston*, 122 Mass., 344; *City of Rahway v. Carter*, 26 Atl. Rep. [N. J.], 96; *Fort Smith v. York*, 52 Ark., 84; *Winbigler v. City of Los Angeles*, 45 Cal., 36; *Hewison v. City of New Haven*, 37 Conn., 475; *Aldrich v. Inhabitants of Gorham*, 77 Me., 287; *City of Detroit v. Putnam*, 45 Mich., 263; *McKeller v. City of Detroit*, 57 Mich., 158; *McArthur v. City of Saginaw*, 58 Mich., 357; *Eastman v. Meredith*, 36 N. H., 284; *Sweeney v. City of Newport*, 65 N. H., 86; *Pray v. Jersey City*, 32 N. J. Law, 394; *Wild v. City of Patterson*, 47 N. J. Law, 406; *Wixon v. City of Newport*, 13 R. I., 454; *Young v. City of Charleston*, 20 S. Car., 116; *Welsh v. Rutland*, 56 Vt., 228; Wil-

kins v. Rutland, 61 Vt., 336; *Wiltse v. Tilden*, 77 Wis., 152; *Goeltz v. Ashland*, 75 Wis., 642; *City of Warsaw v. Dunlap*, 112 Ind., 576; *King v. City of Cleveland*, 28 Fed. Rep., 835; *City of Cleveland v. King*, 132 U. S., 295; *Hiner v. City of Fond du Lac*, 36 N. W. Rep. [Wis.], 632; *City of Omaha v. Ayer*, 32 Neb., 375.

In reply to the second contention of plaintiff in error the following cases were cited: *Dittrich v. City of Detroit*, 57 N. W. Rep. [Mich.], 125; *Reed v. City of Detroit*, 58 N. W. Rep. [Mich.], 44; *Davis v. City of Kingston*, 5 N. Y. Supp., 506; *Butler v. Town of Oxford*, 13 So. Rep. [Miss.], 626.

RAGAN, C.

Harry B. Davis brought this suit to the district court of Douglas county against the city of Omaha, the city being a municipal corporation existing under the laws of the state as a city of the metropolitan class, to recover damages which he alleged he had sustained by reason of injuries which he had received through the negligence of the city. At the close of the evidence the jury, in obedience to an instruction of the court, returned a verdict for the city. Judgment of dismissal of Davis' case was rendered upon this verdict, and he prosecutes here a petition in error.

The undisputed facts, so far as the same are material to this opinion, are: That Judge Doane owned a lot fronting on Seventeenth street, in said city; said street was one of the public thoroughfares of the city and used and traveled by the public as such. On the 3d of May, 1892, the authorities of the city, by resolution, ordered a plank sidewalk in front of Judge Doane's premises to be replaced by a permanent one, and gave

notice to Judge Doane that unless he constructed such sidewalk within five days from the date of the service on him of said notice it would construct the sidewalk and assess the costs thereof to his property. On the 31st of May, 1892, the five days within which Judge Doane was to construct the sidewalk expired and he had not at that time done anything towards constructing it. The city thereupon notified Judge Doane to designate the kind of material of which he desired the sidewalk to be constructed. On the 9th of July, 1892, the city ordered the city contractor to lay an artificial stone sidewalk in front of Judge Doane's premises, but this was not done. On the 15th of October, 1892, Judge Doane began the construction of the sidewalk of Bandera stone in front of his lot; and in the prosecution of this work, and in the afternoon of said day, his employe hauled and deposited in the street, outside the curb in front of said lot, a number of large flag-stones. During the night of said 15th of October Davis was driving on this street in a buggy and it ran against these stones, was partially overturned, he was thrown out and injured. No barriers had been erected to prevent the traveler from coming in contact with these stones, nor had any signals been displayed to warn him of their presence. On the 15th of October, 1892, the city did not know that Judge Doane was proceeding to build the walk in front of his premises. On the 4th of November, 1892, the city, being still in ignorance that Judge Doane had built the sidewalk in front of his premises, ordered the city contractor to build a walk there of Indiana stone. Judge Doane testified on the trial as follows:

Q. State if in the fall of 1892 you received an

order from the city officials that a permanent sidewalk had been ordered laid in front of that property.

A. Yes, sir; I received a notice in the fall, but I had several previous notices to lay the walk, and what time the notice was served I can't now recollect, but having a good plank sidewalk there I concluded I wouldn't pay any attention to the notice, but afterwards in the fall, just what time I cannot tell, I received a blank containing prices of stone, kinds of stone the city had a contract for, and notifying me to select from that such stone as I desired laid.

Q. Well, then what did you do?

A. Then I went on and made the contract with a stone man to lay the walk myself.

Q. So you laid it yourself after having received this order?

A. Yes. * * *

Q. Laid it under the order of the city?

A. Yes, sir.

Cross-examination:

Q. You may state whether or not in laying that walk or making your contract you acted under the directions or control in any manner of the city of Omaha?

A. Nothing further than under the directions they had given me to lay the walk.

Redirect examination:

Q. Never molested you in carrying out that order?

A. No, rather insisted upon its being carried out, rather more than I thought they would do.

Under this evidence the learned district court was of opinion that Davis could not recover against the city, and we agree with him. The fee

of the streets of the municipalities of this state is vested in the municipalities themselves, and the sidewalks of the various municipalities are parts of the streets thereof. We know of no statute of this state, nor of any ordinance of the city of Omaha, which makes, or attempts to make, it the duty of a lot-owner to build, repair, or maintain the sidewalks adjoining his property. Without quoting the statutes under which the city of Omaha exists it may be safely said: That that corporation, as the other municipal corporations of the state, is, by law, charged with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public; and that no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty. (*City of Omaha v. Jensen*, 35 Neb., 68; *City of Beatrice v. Reid*, 41 Neb., 214.) And in the case at bar, if Doane was acting for the city, either as its agent, employe, or contractor, or with its knowledge and permission, then his acts in and about the construction of the sidewalk in front of his premises became and were the acts of the city; and if his placing and leaving the flag-stones in the street in the manner in which they were placed and left was negligence, which caused an injury to Davis, he being free from negligence, we have not the slightest doubt but the city would be liable to Davis for such injury. (See the cases cited above, and *Stephens v. City of Macon*, 83 Mo., 345.)

But what were the relations existing between Doane and the city of Omaha at the time the injury sued for occurred, and at the time the flag-stones were placed in the street which caused such

injury? Section 69 of chapter 12a, Compiled Statutes,—part of the charter of the city of Omaha,—so far as the same is material here, is as follows: “The mayor and city council shall have power * * * to construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary; and to defray the costs and expenses of improvements, or any of them, the mayor and council of said city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent or abutting upon the streets, avenues, alleys, or sidewalks thus in whole or in part * * * constructed or otherwise improved or repaired, or which may be specially benefited by any of said improvements; * * *

Provided further, That in case the grade of any street or part of street used by the public shall not have been established or in any case any street or part thereof shall not have been worked to grade, then and in such case the owner or owners of any lot or lots or lands abutting on such streets or portions of streets as aforesaid shall only be required to construct or repair the sidewalk along such street or part thereof with plank as the council may direct,” etc. As we read this statute it does not make or attempt to make it the duty of a lot-owner to build, maintain, or repair the sidewalks on his premises; but this statute, and others not quoted, devolve upon the municipal corporation the control of all of its streets and alleys and the duty of paving, grading, and maintaining its streets, building and maintaining and repairing its sidewalks. What means the city may employ, what agencies it may engage in the performance

of these duties, is left by the legislature to the city authorities. To reimburse itself for the expense of building and maintaining sidewalks in front of lots the municipal corporation is invested with the power and authority to levy and collect special taxes and assessments upon the lots in front of which the sidewalks are built and maintained. True, the statute quoted says that on certain streets lot-owners shall only be required to construct or repair the sidewalks with plank as the council may direct; but this statute falls far short of imposing, or attempting to impose, on a lot-owner the duty of building, maintaining, or repairing the sidewalks adjoining his property.

As already stated, on the 3d of May, 1892, the city authorities notified Doane that the plank sidewalk in front of his premises must be replaced by a permanent one, and also notified him that unless he should build such permanent walk within five days after the service of that notice upon him, that it, the city, would at once proceed to construct such permanent sidewalk. This action of the city was in conformity with its ordinances; and we think the statute, under which the city exists, authorizes the passage of such ordinances. The city, in giving notice to Doane to construct a permanent sidewalk upon his lot, simply licensed him to furnish the material and construct that walk, in accordance with the ordinances of the city, instead of paying the taxes and assessments which the city might levy on the lot to pay the cost of constructing the walk; in other words, Doane became and was a mere licensee of the city; and had he proceeded with the construction of this walk within five days after the service upon him of the notice to construct the walk, then

we have no doubt that he would have been acting in that manner for and in behalf of the city; and for his negligence in constructing the walk, if he was guilty of negligence, the city would have been liable. (*Stephens v. City of Macon*, 83 Mo., 345.) It is doubtless true that an agency once established is presumed to continue until it is shown to have ceased; and we have no doubt that a general permission or license, given by a city to a lot-owner to build or repair a sidewalk on his premises, will continue until revoked by the city, either expressly or by such conduct on its part as would authorize an inference of revocation. In the case at bar the city, in effect, said to Doane: We have determined that the plank sidewalk in front of your premises shall be replaced by a permanent one. We have the authority to build this walk and charge the expense of it to your property, but we give you permission to construct the walk yourself, in accordance with the ordinances of the city, provided you do it within a certain time. The permission then given Doane was coupled with a condition that the work which he was permitted to do should be undertaken by a certain time, and the failure of Doane to avail himself of the permission given, in the time fixed, worked a revocation of such license. But again, after the license given Doane to construct the sidewalk had expired by its own limitation, he was requested by the city to designate the kind of material out of which he desired the walk constructed. Here, then, was an additional notice given Doane by the city that it had revoked the permission given him. Doane, in whatever he did towards constructing this sidewalk, after the time fixed by the city council in which he might construct it, so far as

this record shows, was a mere trespasser. A lot-owner, because such, has no authority to tear up the sidewalks in front of his premises or to replace them with others. We reach the conclusion, therefore, that the evidence in the record shows that at the time the accident in question happened, and at the time the flag-stones which caused the accident were placed in the street by Doane, he was neither the agent nor the licensee of the city. The city of Omaha is, however, none the less liable in this case for the injury sustained by Davis, if it knew prior to the accident of the existence in the street of these flag-stones; or if they had remained in the street such a length of time prior to the accident as to sustain a finding that the city, by the exercise of ordinary care, could have known of their existence, and was guilty of negligence in not so knowing. The flag-stones which caused Davis' injury were left in the street in the afternoon of the night he was injured. The record does not show that any officer of the city knew of the existence of these flag-stones in the street, or that Doane was building the sidewalk prior to the time the accident occurred. The burden of showing that the city was guilty of negligence in not knowing of the presence of the flag-stones in the street was upon Davis. It does not appear from the record that these flag-stones were deposited in a part of the street used for business purposes, nor in a part of the street which was so constantly used and traveled as to make it negligence *per se* for the city officials not to know of their existence during the short time that intervened between their being left in the street and Davis' being hurt. The judgment of the district court is

AFFIRMED.

J. F. SIEBERLING & COMPANY V. ANSON L.
FLETCHER.

47	847
50	166
54	500

FILED APRIL 7, 1896. No. 6436.

Bill of Exceptions: AUTHENTICATION. A bill of exceptions, though signed and allowed by the clerk of the district court in pursuance of the stipulation therefor required by statute, cannot be used in this court for any purpose, unless the clerk also certifies such bill of exceptions to be the original or a true copy. *Martin v. Fillmore County*, 44 Neb., 719, followed.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

Paul & Templin, for plaintiff in error.

Nightingale Bros., contra.

RAGAN, C.

J. F. Sieberling & Co. brought this suit in the district court of Sherman county against Anson L. Fletcher on a promissory note. Fletcher had a verdict and judgment, and Sieberling & Co. prosecute here a petition in error.

1. The assignments of error argued in the brief are directed first to the action of the district court in the admission and rejection of certain evidence at the trial. These assignments of error cannot be reviewed, for the reason that the bill of exceptions is not authenticated as required by law. It is in precisely the condition that the bill of exceptions was in in *Martin v. Fillmore County*, 44 Neb., 719, and *Romberg v. Fokken*, 47 Neb., 198. The bill of exceptions is signed and allowed by the clerk,

Daley v. Peters.

but there is nowhere in the record any certificate of the clerk that the bill of exceptions is either the original or a copy.

2. The second assignment argued in the brief relates to the action of the district court in giving and refusing certain instructions. On looking into the record we discover that no exception was taken by any person to any instruction given or refused. This assignment, therefore, cannot be considered.

The pleadings support the judgment rendered. It must therefore be, and is,

AFFIRMED.

D. C. DALEY ET AL. V. WILLIAM T. PETERS.

FILED APRIL 7, 1896. No. 6487.

1. **Executions: EXEMPTIONS: APPRAISEMENT: DUTY OF OFFICER.** When an officer seizes property under execution or attachment, and the debtor makes and files an inventory under oath in accordance with section 522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers and have the property levied upon appraised, and, if the appraised value of the property is five hundred dollars or less, release and return the property to the debtor.
2. ———: ———: **UNLAWFUL SALE: CONVERSION.** Where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by section 522 of the Code of Civil Procedure, and the officer neglects or refuses to cause the property to be appraised, but proceeds to sell it to satisfy his writ, he is thereby guilty of the conversion of the property.
3. ———: ———: **AFFIDAVIT: CONVERSION.** Where, in such case, the officer is sued for the conversion of such property, the fact that the averments, or any of them, in the

Daley v. Peters.

affidavit attached to the inventory were false, affords him no defense to the action.

4. ———: CONVERSION: DAMAGES. The only issue available in such an action is the value of the property wrongfully converted. *Smith v. Johnson*, 43 Neb., 754, and *Bender v. Bame*, 40 Neb., 521, reaffirmed.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

B. N. Robertson, for plaintiffs in error.

No appearance for defendant in error.

RAGAN, C.

Before a justice of the peace in Douglas county one McCargar obtained a judgment against William T. Peters for \$19.25. An execution was issued on this judgment and delivered to one Daley, a constable, and he levied the same upon a horse and wagon and buggy and some harness belonging to Peters. Thereupon Peters filed with the justice of the peace an inventory, under oath, of the whole of the personal property owned by him, as required by section 522 of the Code of Civil Procedure. The constable, however, disregarded the inventory and neglected and refused to call appraisers and have the personal property of Peters appraised, as provided by said section of the Code, and sold all the property levied upon under his execution. The constable then made return on his execution that he had received \$97 in money for the property sold; that he had disbursed of that money \$50 in discharging a chattel mortgage lien upon the property; paid \$12 for feeding the horse, \$3.25 for storing the buggy, \$1.50 for expressage, \$2.91 commission, \$2 for ad-

vertising, \$2 for a clerk, \$2.40 for his fees, and turned in to the justice \$20.94 to apply on the judgment. Peters then brought this suit in the district court of Douglas county against Daley and the sureties on his bond for the conversion of the property levied upon and sold by the constable. Peters had a verdict and judgment and defendants prosecute to this court a petition in error.

The inventory filed by Peters with the justice recited that it was an inventory of the whole of the personal property owned by him, and that he was a resident of the state of Nebraska, the head of a family, and that he had neither lands, town lots, nor houses subject to exemption as a homestead. This inventory was duly signed and sworn to by Peters. It is now insisted that the judgment of the district court must be reversed because the answer alleges that Peters, at the time he made and filed the inventory, was possessed of and in possession of a homestead in Douglas county, and that the reply does not deny this. Section 521 of the Code of Civil Procedure provides: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of \$500 in personal property." Section 522 of the Code provides: "Any person desiring to avail himself of the exemption as provided for in the preceding section must file an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him. * * * And it shall be the duty of the officer to whom the execution is directed to call to his

assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value." If it be true that Peters owned a homestead exempt from execution under the laws of the state at the time he made and filed the inventory herein, is that a defense for Daley in this action? What was the duty of Daley, the constable, holding the execution when this inventory was filed? In *People v. McClay*, 2 Neb., 7, a debtor filed an inventory of all his personal property as required by said section 522 of the Code of Civil Procedure. The officer refused to call appraisers, as required by the statute, and have the property appraised. The execution debtor then applied to this court for a writ of *mandamus* to compel the officer to call appraisers and have the property mentioned in the inventory filed by the judgment debtor appraised. The officer made answer to the alternative writ that the execution debtor, though the head of a family, was an alien, not a resident of the state. The court held that the answer was entirely insufficient and awarded the writ prayed for. LAKE, J., speaking for the court, said: "The relator filed an inventory of all his personal property as required by section 522 of the Code of Civil Procedure. * * * This done, the respondent had but one course to pursue. This was to call three disinterested freeholders of the county and have them appraise the property," etc. *State v. Cunningham*, 6 Neb., 90, was a *mandamus* proceeding in this court to compel a sheriff to call freeholders and cause certain personal property levied upon by him to be appraised, the execution debtor having filed the inventory required by section 522 of

the Code of Civil Procedure. The opinion does not disclose what reason the sheriff alleged as an excuse for failing to comply with the mandates of the statute. The court awarded the writ as prayed, MAXWELL, J., saying: "In the case of *People v. McClay*, 2 Neb., 8, it was there held that when an inventory, under oath, was filed with the officer he had but one course to pursue, and that was to call three disinterested freeholders of the county and have them appraise the property.

* * * We approve of that decision. The officer cannot question the correctness of the inventory. If the debtor has real estate which is exempt under the homestead law, or other personal property than that contained in his list, such personal property is liable to be seized for his debts and he may be prosecuted for perjury. But when an inventory under oath is made by the debtor and filed with the officer holding the execution * * he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter." In *Kriesel v. Eddy*, 37 Neb., 63, a constable of Douglas county levied an execution upon certain goods of Kriesel, who thereupon filed an inventory under oath with the justice of the peace before whom the judgment was rendered, reciting that he was the head of a family, etc., and that he had no other property except the goods which had been seized by the constable. The constable refused and neglected to cause the property levied upon to be appraised, but proceeded and sold it under the execution. Kriesel then sued the constable and his bondsmen for the conversion of the property. On the trial of the case the district court permitted evidence to go to the jury to contradict the averments of the affidavit attached to

Kriesel's inventory; that he was the head of a family and a resident of the state, and at the close of the testimony directed a verdict for the defendant. This judgment on proceedings in error here was reversed, the court, through RYAN, C., saying: "Upon the filing of such an affidavit containing an inventory of all the property owned by Kriesel, the law devolved upon the constable holding the execution but one course of action, and that consisted in his calling three disinterested freeholders of Douglas county to appraise said property levied upon at its cash value.* * * In this case the constable ignored the affidavit containing the inventory and sold all the property which he held under his execution. This rendered him liable for the fair value of said property, at least to the amount of \$500, and there was no issue in the district court properly triable except such value. Officers holding executions should act under the statutes as well to protect the judgment debtor in the enjoyment of the exemption provided by statute as to collect the judgment upon which the execution issued. Such officers may, by arbitrarily overriding the statute, prevent the beneficial operation of the exemption law in favor of the debtor. This is but one species of oppression in office, for which such officers as are guilty will be held liable to strict accountability if their victims are able to apply to the courts for redress." *Bender v. Bame*, 40 Neb., 521, was a suit against an officer for conversion of certain personal property. The execution debtor, at the time the property was levied upon, filed an inventory under oath as required by the provisions of section 522 of the Code of Civil Procedure. The officer refused and neglected to make any appraisement and sold the

property. NORVAL, C. J., speaking for the court, said: "That the officer did not cause an appraisement to be made is no fault of the defendant in error [judgment debtor]. All the law required of him was to make and file with the justice an inventory under oath of his personal property, and, after the appraisement has been made, to select therefrom property to the amount of the statutory exemption. It is the well settled law of the state that exemption laws are to be construed liberally to the end that the purpose for which they were adopted may be accomplished. After the debtor has complied with the law on his part he ought not to be deprived of his exemption by the failure of the officer to perform his duty. To hold, when exempt property has been seized under execution and the proper inventory has been filed, that an action for conversion will not lie, where the officer fails or refuses to make an appraisement, would, in many cases, destroy the value of the exemption by preventing the debtor from deriving any benefit from it." And in *Smith v. Johnson*, 43 Neb., 754, where all the cases cited above were reviewed, this court held: "It is without the province of an officer holding property under levy of writ, pending sale by order of the court in attachment proceedings, to question the validity or sufficiency of a schedule and affidavit made according to the provisions of the statute governing such proceedings and filed by the attachment debtor for the purpose of setting aside the property levied upon as exempt." These cases, then, establish the following propositions: (1.) That when an officer seizes property under execution or attachment and the debtor makes and files an inventory under oath in accordance with the provisions of section

522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers and have the property levied upon appraised; and if the appraised value of the property is \$500 or less, to release and return it to the debtor. (2.) Where an officer makes a levy upon personal property and the debtor files under oath the inventory required by said section of the Code, and the officer neglects or refuses to cause the property to be appraised and proceeds to sell it to satisfy his writ, that he is thereby guilty of a conversion of the property. (3.) And when sued for a conversion of such property the fact that the averments, or any of them, in the affidavit attached to the inventory were false affords him no defense to the action. (4.) The only issue available in such action is the value of the property wrongfully converted.

If an officer holding an execution may arbitrarily disregard his duties as prescribed by the statute, and, notwithstanding an inventory under oath be filed by the debtor as required by the statute, refuse and neglect to cause the property to be appraised and sell it, then the very object and purpose of these wise and beneficent exemption laws will always be thwarted. It has been well said: "The common law had no favors to offer the debtor or his family in the way of exempting any portion of his property from execution for the benefit of his family; and if he owned two gowns one might be seized and sold. Modern legislation has removed this reproach to the law and there is probably no state or civilized country in the world in which some kind of an exemption is not now allowed. These statutes are designed as a protection for poor and destitute families and

the law thus seeks to mitigate the consequence of the husband's thoughtlessness and improvidence. They are based upon considerations of public policy and humanity and should be liberally construed." (7 Am. & Eng. Ency. of Law, p. 130.)

It is no concern of a constable or sheriff whether an affidavit attached to an inventory filed by a debtor be true or false. If it is false, the debtor may be prosecuted for perjury. That is a matter between him and the state of Nebraska. The law has not committed to the sheriffs and constables of the state the authority or the duty to inquire into the truth of the averments of the affidavit attached to an inventory filed by an execution or attachment debtor.

Another argument insisted upon for the reversal of this judgment is, in effect, that in any event the constable should not be charged with the full value of the property levied upon and sold by him, but that the judgment at least should be credited with the amount of the mortgage on the property which the constable paid off and discharged out of the proceeds of the sale. We have been cited to no authority to sustain this remarkable contention, nor do we think any can be found. The constable was a wrong-doer in everything that he did with the property after the filing of the inventory by Peters. If the property had been subject to execution the constable, by selling it, would have sold only the interest which Peters had therein; and the purchaser at the sale would have taken the property subject to the mortgage lien, if any, thereon. The constable was not the administrator, agent, or guardian of Peters. He was not charged by the latter with the duty of calling in the creditors of Peters and paying his

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debts out of his property. Looking at the express provisions of the exemption laws of the state, their purpose and object, and liberally construing these statutes, and influenced also by considerations of public policy, we hold: Where an officer levies an execution or writ of attachment upon personal property and the debtor files an inventory under oath as required by section 522 of the Code of Civil Procedure, and such officer neglects or refuses to cause the property levied upon to be appraised, but proceeds and sells the same, and the debtor then sues him for the conversion of the property, that the courts will not permit him to urge as a defense to that action that any of the averments in the affidavit attached to the debtor's inventory were false.

The judgment of the district court is right and it is in all things

AFFIRMED.

JOHN RIDER ET AL. V. JOHN H. MURPHY.

47	857
54	546

FILED APRIL 7, 1896. No. 6468.

1. **Malicious Prosecution: PROBABLE CAUSE: MALICE.** To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause.
2. ———: ———. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable man's mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. (14 Am. & Eng. Ency. Law, 24.)
3. ———: ———: **MALICE.** Evidence examined and found

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wholly insufficient to sustain the finding of the jury that the plaintiffs in error were inspired by malicious motives in causing the defendant in error to be prosecuted for the crime of embezzlement, and wholly insufficient to support the finding of the jury that such prosecution was begun and carried on without probable cause.

ERROR from the district court of Douglas county. Tried below before OGDEN, J.

James W. Orr and Lee S. Estelle, for plaintiffs in error.

Schomp & Corson, contra.

RAGAN, C.

In the district court of Douglas county John H. Murphy sued John Rider and Fred H. Glick and one J. A. Rider, since deceased, for damages for malicious prosecution. Murphy had a verdict and judgment, and Rider & Glick prosecute to this court a petition in error.

It appears that in the autumn of 1891 Rider & Glick were engaged in business in the city of Omaha, and dealing in butter, eggs, and poultry and other farm products. On the trial of this case the evidence of Murphy, so far as the same is material here, was, in substance, as follows: In November, 1891, at the instance of Rider & Glick, he went to Milford, in this state, to purchase butter and eggs and poultry. He purchased a considerable quantity which he shipped to Rider & Glick. Murphy paid his traveling expenses and Rider & Glick furnished the money to pay for the products bought. These products Murphy shipped to Rider & Glick at Omaha and they disposed of them. When Murphy returned to Omaha from the Milford trip, a difficulty arose be-

tween him and Rider & Glick as to the amount of money that was coming to him from them for the products he had bought and shipped them on this Milford trip. Murphy claimed that he was to have one-half the profits realized from the products purchased, and that those profits ought to be somewhere in the neighborhood of \$300. Rider & Glick, on the other hand, claimed that the amount due to Murphy was \$6.77. They made him out a statement from the books showing this fact and offered him a check for that amount of money. Murphy became enraged and refused to accept the check in settlement, threw it down, and left the office of Rider & Glick. He called at the office of Rider & Glick several times after that time, but the Milford deal was not talked of at all those visits.

Early in December, 1891, Murphy, while at the office of Rider & Glick, was told by them that he could make some money by buying potatoes in Iowa for them; that they would furnish the money to pay for the potatoes and pay thirty cents a bushel for all the potatoes—not exceeding a certain quantity—which he might buy, Murphy to have as compensation the difference between what he might pay for the potatoes and the thirty cents a bushel which Rider & Glick were to pay. He agreed to go to Iowa and buy potatoes on these terms and went to Glick and said, "I will take that check now." Glick thereupon handed Murphy the check for \$6.77. The check was dated the 8th of December, 1891, and Murphy the next morning presented this check to the bank on which it was drawn, and he then discovered that it had written across the back of it, "in full settlement of account," whereupon he erased that

indorsement and cashed the check. Murphy then went to Iowa and contracted for some potatoes. He caused Rider & Glick to deposit \$100 in a bank in Iowa to his credit with which to pay for the potatoes bought. He then came to Omaha and told Rider & Glick that he had bought some potatoes for them; that they would be shipped in refrigerator cars and would not arrive for about a week, and then demanded of them that they first settle up the Milford deal in accordance with what he claimed. This, we repeat, is substantially Murphy's evidence. The record further shows that no part of the money which Rider & Glick furnished Murphy was ever returned to them nor did they ever receive any of the potatoes bought with that money by Murphy. Very soon after the last interview described between Murphy and Rider & Glick the latter ascertained that Murphy had used the money sent him in buying potatoes; that he had put them in a car and consigned them to Hayden Bros., a firm doing business in the city of Omaha. Acting upon this information Rider & Glick swore out a complaint charging Murphy with embezzlement. He was bound over to the district court, an information charging him with embezzlement was filed by the prosecuting attorney, on which he was tried and acquitted. This is the prosecution made the basis of the present action. Does this evidence support the verdict? In *Dreyfus v. Aul*, 29 Neb., 191, this court held: "To entitle the plaintiff to recover in such an action he must prove a want of probable cause, malice of the defendant, and that the criminal prosecution is ended." This case was followed in *Vennum v. Huston*, 38 Neb., 293, and it was there held: "To render a

prosecuting witness liable in an action for malicious prosecution it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause." In *Davie v. Wisher*, 72 Ill., 262, probable cause is thus defined: "Probable cause is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." And in 14 American & English Encyclopedia of Law, 24, the authorities, as to what constitutes probable cause, are collated, and it is there said: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."

Now, let us examine the undisputed evidence in this case, and the evidence of Murphy himself, in the light of the rules and authorities quoted above. Rider & Glick prosecuted Murphy for the crime of embezzlement. They knew at the time they did so that he had been acting as their agent to purchase potatoes for them; that he had used the money they furnished him for that purpose in the purchase of potatoes; that he had shipped these potatoes to other persons and that he had in effect, according to his own evidence, demanded of them that they allow him some \$300 which he claimed was due from the Milford deal, as a condition precedent to his delivering to them the potatoes which he had bought for them with their money, or the proceeds thereof. They also knew that when he was first informed as to the amount

coming to him from the Milford deal that he had refused to accept it; that subsequently he had undertaken to buy potatoes for them and had voluntarily demanded the check which he had refused in settlement of the Milford deal; that he had received and cashed that check; and they had the right to believe from Murphy's conduct that the difference which had existed between them in reference to the profits of the Milford deal had by them been settled to Murphy's satisfaction, or that he had accepted the check in settlement. (*Treat v. Price*, 47 Neb., 875.) It seems to us that these facts and circumstances known to Rider & Glick, and on which they acted, were sufficient to excite the belief in their minds, they being reasonable men, that Murphy was guilty of the crime with which they charged him, but whether Murphy accepted the check of \$6.77 in settlement of the Milford deal or not, the evidence shows beyond all question that Rider & Glick thought he had; and the argument is now made here in behalf of Murphy, that Rider & Glick had the books showing the profits of the Milford deal; that they had Murphy in their power, and that he, Murphy, felt and realized his position, and thought what he lacked in power he must supply by policy; he must in some way get the firm of Rider & Glick to be his creditor rather than his debtor; in other words, this argument is a concession by Murphy's counsel, that at the time he accepted the check not only did Rider & Glick believe that he accepted it in settlement, but that Murphy knew they so understood. But if it be conceded that Murphy did not accept this check in settlement of the Milford deal, he was none the less the agent and trustee of

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Rider & Glick in the transaction of purchasing the potatoes. We think, therefore, that Rider & Glick had probable cause to believe Murphy guilty of embezzlement at the time they caused him to be arrested for that crime.

There is in the record no evidence to support the finding of the jury that the conduct of Rider & Glick in causing Murphy to be prosecuted for embezzlement was inspired by a malicious motive; nor to support the finding of the jury that the prosecution was begun and carried on without probable cause. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

DAVID NEHR V. JOHN A. DOBBS.

FILED APRIL 7, 1896. No. 6452.

1. **Malicious Prosecution: PROBABLE CAUSE: EVIDENCE: CONVICTION.** In an action for malicious prosecution, a presumption of the existence of probable cause is established by proof that the plaintiff was convicted in the criminal action. But this presumption may be rebutted.
2. ———: ———: ———: ———. It is not true that the evidence of probable cause afforded by proof of a conviction, can be rebutted only by showing that the conviction was procured by fraud or perjury. These are only instances. Such evidence may be rebutted by proof of any facts which show that the conviction was under circumstances depriving it of any naturally probative effect.
3. ———: ———: **PLEADING.** A petition in an action for malicious prosecution pleaded that the plaintiff had been convicted in the county court and on appeal in the district court; that the conviction had been reversed by the supreme court and the cause thereafter dismissed.

It was also pleaded that the defendant, when he instituted the prosecution, was aware of certain facts which in law established the innocence of the plaintiff; that he had himself in the county court testified to those facts; whence it appeared that the conviction in the lower courts was not upon any consideration of evidence which would justify a conviction, but was due solely to a misapprehension of law. *Held*, That the petition sufficiently pleaded want of probable cause.

4. ———: ———: QUESTION OF LAW. The existence of probable cause, the facts being established, is a question of law, and if the defendant is aware of facts establishing the innocence of the plaintiff, a misapprehension of the law does not create probable cause, although it may affect the issue of malice.

ERROR from the district court of Gage county.
Tried below before BABCOCK, J.

The opinion contains a statement of the case.

Hardy & Wasson, for plaintiff in error:

In an action for malicious prosecution a judgment of conviction against the plaintiff is *prima facie* evidence that there was probable cause for the prosecution, but such evidence may be rebutted by proof that the judgment was based upon false testimony and was without foundation in law. (*Olson v. Neal*, 63 Ia., 216; *Burt v. Place*, 4 Wend. [N. Y.], 591; *Newell*, Malicious Prosecutions, 275; *Hazzard v. Flury*, 120 N. Y., 223; *Goodrich v. Warner*, 21 Conn., 432; *Phillips v. City of Kalamazoo*, 53 Mich., 33; *Richter v. Koster*, 45 Ind., 440.)

The criminal action was voluntarily dismissed. The burden of showing cause for its commencement was upon defendant. (*Burhans v. Sanford*, 19 Wend. [N. Y.], 417; *Gilbert v. Emmons*, 42 Ill., 143; *Kinsey v. Wallace*, 36 Cal., 462; *Green v. Cochran*, 43 Ia., 544.)

Hugh J. Dobbs, contra:

A conviction of the offense charged, when obtained without perjury, subornation of perjury, fraud, collusion, conspiracy, or other misconduct on the part of the complaining witness and trial court, is sufficient evidence of probable cause to defeat an action for malicious prosecution, although such conviction be followed by a reversal of the judgment, or by a new trial and an acquittal. (*Cloon v. Gerry*, 13 Gray [Mass.], 201; *Witham v. Gowen*, 14 Me., 362; *Payson v. Caswell*, 22 Me., 212; *Bitting v. Ten Eyck*, 82 Ind., 421; *Parker v. Farley*, 10 Cush. [Mass.], 279; *Parker v. Huntington*, 2 Gray [Mass.], 125; *Commonwealth v. Davis*, 11 Pick. [Mass.], 433; *Whitney v. Peckham*, 15 Mass., 243; *Herman v. Brookerhoff*, 8 Watts [Pa.], 240; *Adams v. Bicknell*, 126 Ind., 210; *Reynolds v. Kennedy*, 1 Wils. [Eng.], 232; *Griffis v. Sellars*, 31 Am. Dec. [N. Car.], 422; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md., 461; *Burt v. Place*, 4 Wend. [N. Y.], 591.)

IRVINE, C.

This was an action for malicious prosecution by the plaintiff in error against the defendant in error. A general demurrer to the petition was sustained, and from a judgment entered thereon the plaintiff prosecutes error.

The point relied on in support of the demurrer is that the petition discloses that the plaintiff suffered a conviction in the court in which the prosecution complained of was instituted, and that while it is alleged that this conviction was reversed on appeal, the conviction in the original court was conclusive of the existence of probable

cause for the prosecution, or, if not conclusive, it could be rebutted only by evidence of fraud, perjury, or subornation of perjury, leading to the conviction, none of which was pleaded. The petition alleges that the defendant falsely and maliciously, and without probable cause, charged the plaintiff before the county judge of Gage county with having maliciously and unlawfully shot and killed a certain dog, the property of Dobbs; that he caused plaintiff's apprehension in such cause; that on the trial before the county court, Dobbs testified and admitted that the dog killed had no collar upon his neck with a metallic plate thereon inscribed with the name of his owner; and that the dog was running at large and attacked the plaintiff; that all such facts were well known to the defendant when the charge was made; that the plaintiff was convicted in the county court; that he appealed to the district court; that he was there again convicted; and that he prosecuted error to this court, where the judgment was reversed; and that after the cause was remanded to the district court it was dismissed. That it is not unlawful to kill a dog running at large, not bearing the collar required by law, was decided in *Nehr v. State*, 35 Neb., 638, which, by the way, is the case which constitutes the foundation of this action. It is therefore in effect pleaded that defendant caused plaintiff to be prosecuted, knowing the fact, which showed that he was guilty of no offense; that in the county court he testified frankly to those facts; that the plaintiff was, notwithstanding, convicted by the county court, and on appeal by the district court, on account of a misapprehension of law; and that the error was corrected by this court on proceedings in error,

the conviction reversed, and the cause finally dismissed. The question, therefore, presented is whether the conviction in the county court, or in the district court, or in both, was conclusive evidence of the existence of probable cause for the prosecution, notwithstanding the fact that the plaintiff was aware of the facts which on a correct interpretation of the law would defeat the prosecution. The older cases are, we think, all to the effect that a conviction is conclusive evidence of the existence of probable cause for the prosecution; and there are many cases holding that this is true, although there may be an acquittal on an appeal or after a reversal of the judgment. (*Herman v. Brookerhoof*, 8 Watts [Pa.], 240; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md., 461; *Cloon v. Gerry*, 13 Gray [Mass.], 201; *Whitney v. Peckham*, 15 Mass., 243.) In the Maryland case cited there is a strong dissenting opinion published in an appendix. (67 Md., 605.) There are many other Massachusetts cases in line with those cited, although that of *Morrell v. Trenton Mutual Life & Fire Ins. Co.*, 10 Cush., 282, recognizes the fact that there may be some exceptions to the rule. The same may be said of *Phillips v. City of Kalamazoo*, 53 Mich., 33. On the contrary, the injustice of a universal application of such a rule has been long recognized. An early case of this character is *Burt v. Place*, 4 Wend. [N. Y.], 591. In that case it was held that although there had been a conviction, the evidence afforded by that fact of the existence of probable cause was rebutted by proof that a full defense had existed to the knowledge of the defendant, and that he had caused the plaintiff to be detained as a prisoner for the purpose of preventing him procuring such evidence

to establish his defense. Following this case, there is a long and well reasoned line of authorities to the effect that although the plaintiff may have been convicted, still if his conviction was procured by fraud, by perjury, or by subornation of perjury on the part of defendant, these facts may be shown to rebut the presumption of probable cause arising from the conviction. (*Olson v. Neal*, 63 Ia., 214; *Witham v. Gowen*, 14 Me., 362; *Payson v. Caswell*, 22 Me., 212; *Richter v. Koster*, 45 Ind., 440; *Adams v. Bicknell*, 126 Ind., 210; *Goodrich v. Warner*, 21 Conn., 432.) The last two cases cited do not undertake to define the exceptions to the general rule, but are to the effect generally that the conviction, although it be afterwards reversed, is *prima facie* evidence—and that only—of the existence of probable cause. To the same effect is *Knight v. International & G. N. R. Co.*, 61 Fed. Rep., 87. The best review of the cases to which our attention has been called is contained in the case of *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S., 141. The conclusion was there reached that all the cases can be reconciled by adopting the doctrine that the presumption of probable cause arising from a conviction can be rebutted only by showing that the conviction had been obtained by fraud. This court has recognized the principle that where the conviction has been procured by fraud or perjury, even an unreversed conviction does not necessarily defeat a recovery. (*Murphy v. Ernst*, 46 Neb., 1.)

A bald application of the foregoing cases would lead to an affirmance of this judgment, because the petition does plead a conviction both in the county and in the district courts; and it is not pleaded that the defendant resorted to any fraud,

perjury, or false testimony to procure the same. We think, however, that the cases cited hardly warrant so narrow a conclusion as that adopted by the supreme court of the United States in *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, *supra*. Indeed, the court in that case did not undertake to precisely define the rule, and expressly stated that no such precise definition was necessary to a decision of the case before it. All the cases, with one exception, in which the courts undertook to define the exceptions were cases where fraud or perjury was alleged, or cases resolved in favor of the defendant because no exception was alleged, and where fraud and perjury were merely mentioned incidentally as sufficient to take the case out of the rule. The principle which we induce from the cases is this: that a conviction is always sufficient *prima facie* evidence of the existence of probable cause; but that this is a rule of evidence, founded upon the fact that ordinarily if a court has proceeded to conviction, it must have had before it such evidence as in the mind of a prudent and reasonable man would convince him of the guilt of the accused; and that, therefore, a subsequent reversal, while it may show that the accused was in fact innocent, does not show that there was no probable cause for believing him guilty. Where, however, the conviction is under such circumstances as to deprive it of such naturally evidentiary effect, this presumption ceases. Where it is shown that the conviction is procured by fraud, or by perjury, or by subornation of perjury, we have cases where the conviction has no convincing effect upon the mind; and when the courts have stated that establishing that the conviction was had under these circumstances re-

but the natural presumption from an ordinary conviction, they have simply declared that such exceptions do exist, and have not declared that there may not be other exceptions. In the case before us it is pleaded that the defendant knew and testified that the dog was running at large without a collar. This court has declared that under such circumstances it is lawful to kill the dog. Therefore, the conviction in the county court and in the district court could not have been due to an error in weighing the evidence, but it must have been due solely to a mistake of law arising from such admitted facts. The presence or absence of probable cause for a prosecution, the facts being established, is for the court and not for the jury (*Turner v. O'Brien*, 5 Neb., 542),—that is, it is a question of law and not of fact; and while a mistake of fact on the part of defendant in an action of malicious prosecution may affect the question of probable cause, a mistake of law does not. (*Hazard v. Flury*, 120 N. Y., 223.) A misapprehension of the law may affect the issue of malice, but not that of probable cause. If the county court had properly interpreted the law the plaintiff would have been discharged, and the fact that defendant was aware of those things which justified plaintiff's conduct could have been shown in evidence to establish want of probable cause. Is there any reason why the misapprehension of law by the county judge should affect the case and destroy a cause of action which would have existed had the law been correctly determined in the first instance? We think not. The reason that a conviction procured by perjury is not proof of the existence of probable cause for the prosecution is that the false testimony deceived the trial court,

so that the inference naturally drawn from a judgment of that court is no longer a reasonable inference. So where it is pleaded that the proof disclosed an entire want of probable cause, but that the court mistook the law, and that on appeal the judgment was for that reason reversed, the probative character of the judgment of conviction is in like manner destroyed. The case is very different from nearly all the cases in which the old rule was laid down, which were cases where the law was clear, and the only question was whether the facts had been correctly determined on conflicting evidence. In such cases the judgment of conviction is most clearly and forcibly probative. We have found no case supporting the application of the rule just announced, in direct terms. But we think it is in principle supported by all the cases which recognize a conviction only as *prima facie* evidence and hold that it may be rebutted. The case of *Herman v. Brookerhoof*, *supra*, was a case like this, and is contrary to the view which we have taken. But it was decided in 1839, citing only very early cases, and only a few years after the case of *Burt v. Place*, *supra*, marked the first departure from the old doctrine. It proceeds upon purely technical grounds, and we do not think it should be followed. We hold, therefore, that the petition, by pleading a knowledge by the defendant, at the time he instituted the prosecution, of facts which in law discharged the plaintiff from culpability, and in pleading sufficient to show that the conviction in the lower court was due to a misapprehension of law, and not to a consideration of evidence justifying a conviction, sufficiently rebutted the presumption of probable cause arising from the first conviction. The effect

Cummins v. Cummins.

of these facts on the issue of malice we do not determine. Malice was pleaded and is a question for the jury.

REVERSED AND REMANDED.

FRANCIS M. CUMMINS V. ALICE V. CUMMINS.

FILED APRIL 7, 1896. No. 6430.

1. **Divorce: EVIDENCE: COLLUSION.** In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details.
2. ———: ———: **REVIEW.** Where the testimony in such a case, when taken in connection with all the circumstances, is weak and open to suspicion, through a failure to corroborate it on points admitting of corroboration, the action of the district judge in denying a divorce will not be set aside, although the evidence may have been such that it would have sustained a decree for plaintiff, and in cases of a different character might have required it.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Simeon Bloom, for plaintiff in error.

No appearance for defendant in error.

IRVINE, C.

The plaintiff in error brought this action to procure a divorce from the defendant in error. Service was had by publication. There was no

appearance by the defendant in error, but on the evidence the court found for the defendant and dismissed the case. The errors assigned are that the judgment is not sustained by sufficient evidence; that it is contrary to law; and that the court erred in overruling the motion for a new trial. The grounds assigned in this motion are that the judgment is not sustained by sufficient evidence, and that it is contrary to law. We have, therefore, presented, in effect, simply the sufficiency of the evidence. The ground on which the divorce was claimed was cruelty practiced by the wife against the husband. The husband's testimony is to the effect that the defendant had always been harsh and unkind to him; that she had refused to cook for him, wash for him, and mend his clothes; that she had denied him sexual intercourse, and that certain events had persuaded him that she had attempted to poison him. The last charge, if true, undoubtedly constitutes cruelty (1 Nelson, Divorce and Separation, secs. 266, 308), but the sufficiency of the evidence to establish an attempt to poison was in the first instance for the trial court, as was the sufficiency of the evidence on other branches of the case. The evidence on this subject was that, after two successive meals, the plaintiff was taken violently sick. Thereafter he detected some foreign substance in his coffee cup, and observed his wife pouring something from a paper into the coffee. He found some article in her possession which he supposed to be the same substance, but he had made no effort to ascertain its character. The parties had three children, aged seventeen, nineteen, and twenty-two years. The plaintiff, it appears, knew where these children were. They

were living in the household at the time of these events. They remained with their mother after the separation and their testimony was not produced. The plaintiff was corroborated in some parts of his testimony by a woman who had lived next door to the parties in Kansas, and who testified that she had done washing for the plaintiff and had heard the defendant use harsh and abusive language toward him. His testimony was not corroborated in other particulars. It has been said that the state is a third party to all divorce cases. It is not true that a petition stands confessed because not answered; nor is the judge who tries a divorce case obliged to find for the plaintiff, simply because he testifies to a state of facts, which, if believed, would warrant a decree in his favor. The judge should be satisfied that there is no collusion; that the case is prosecuted in good faith, and that a cause of action exists. This case was begun scarcely seven months from the time the plaintiff came to the state, which was the time of separation. He had then left his wife and his three children behind him, the children choosing to remain with the mother. The parties had lived together for more than twenty-two years. The charges of harshness and unkindness were proved only in the most general and vaguest way. The charge that the wife had refused to do the cooking, laundry work, and mending for the family was probably not the charge of a very great offense, in view of plaintiff's testimony that his earnings were \$140 per month. The charge of denying the plaintiff sexual intercourse was as vaguely substantiated as the charge of unkind language. It did not appear for what period or under what circumstances

there had been such denial. The charge of poisoning was in no degree corroborated, while the evidence showed that through the children and the services of a chemist corroboration might have been obtained had the charge been true. If the trial judge had seen fit to grant a divorce upon the testimony, we would not disturb his action, but in such cases so much depends upon the manner and demeanor of the witnesses that, in view of the weakness of the evidence in this case, while it would be sufficient to support a different finding, we cannot disturb the finding which was made. (2 Nelson, Divorce and Separation, sec. 809.)

JUDGMENT AFFIRMED.

C. P. TREAT V. THOMAS PRICE.

FILED APRIL 7, 1896. No. 6326.

47	875
47	808
448	807
47	875
49	155

1. **Accord and Satisfaction:** CONSIDERATION: DISPUTED CLAIMS. The rule that when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the later agreement is without consideration. Such rule does not apply where the amount due is disputed or unliquidated.
2. ———: ———: ———: DEFINITION OF "LIQUIDATED." The word "liquidated," when used in this connection, means that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law.
3. ———: ———: ———. The rule does not apply where there is a *bona fide* dispute between the parties as to the sum justly due.
4. ———: ———: ———. The fact that the sum paid is in

such case only the amount that the debtor concedes to be due, does not invalidate the settlement.

5. **Receipt: SETTLEMENT: CONSIDERATION.** If a consideration is necessary to sustain a settlement made by the payment and receipt in full satisfaction of the sum which the debtor admits to be due, it is found in the fact that the creditor by accepting such sum thereby avoids the delay, expense, and labor of an accounting, and avoids threatened litigation.
6. **Accord and Satisfaction: PAYMENT: CONDITIONAL ACCEPTANCE.** Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.
7. ———: ———: ———: **RECEIPT.** A being indebted to B in an uncertain amount sent to the C bank the amount which A conceded to be due, with instructions to pay the sum to B but only in full settlement, and on his signing a receipt to that effect. B, protesting that more was due, accepted the money and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account and not in settlement. *Held*, That by receiving the money he had accepted the condition on which it was tendered, and that his protest availed nothing.
8. ———: ———: ———: ———: **AGENCY: NOTICE.** *Held further*, That the terms of the receipt and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement.
9. ———: **RECEIPT.** An *obiter dictum* in conflict with some of the foregoing statements, in *Price v. Treat*, 29 Neb., 536, disapproved.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

See opinion for statement of the case.

Concin & McHugh and *Munger & Courtright*, for plaintiff in error:

Defendant below was entitled to a verdict under the evidence in this case and the court should have so instructed the jury. The release executed by Price upon the last payment was a complete satisfaction of the demand. The rule, that payment of a smaller sum cannot be a satisfaction of a larger debt, is applicable only to cases where the larger debt is fixed and liquidated, and does not apply where the previous claim is unliquidated and uncertain. (*Cumber v. Wane*, 1 Str. [Eng.], 426, and note; *Stearns v. Johnson*, 17 Minn., 142; *Fuller v. Kemp*, 33 N. E. Rep. [N. Y.], 1034; *American Manganese Co. v. Virginia Manganese Co.*, 21 S. E. Rep. [Va.], 466; *Reynolds v. Empire Lumber Co.*, 85 Hun [N. Y.], 470; *McDaniels v. Lapham*, 21 Vt., 222; *Bull v. Bull*, 43 Conn., 455; *Cummings v. Baars*, 36 Minn., 350; *Donohue v. Woodbury*, 6 Cush. [Mass.], 148.)

Charles O. Whedon and *C. A. Baldwin*, contra.

IRVINE, C.

Treat sued Price alleging in one count that he had performed, under a contract with Price, certain grading work for a railroad and asking judgment for an unpaid balance on account thereof; and in another count alleging the conversion by Price of certain tools used in the work. The district court entered judgment for the defendant on the pleadings. The plaintiff brought the case to this court on error, and the judgment of the district court was reversed. (*Price v. Treat*, 29 Neb., 536.) The former report of the case contains a

sufficient statement of the pleadings. After the cause was remanded, there was a trial to a jury resulting in a verdict and judgment in favor of the plaintiff for \$10,372.13. The defendant now brings the cause here by petition in error. Recurring to the former opinion it will be found that one of the defenses pleaded was that the defendant rendered to the plaintiff a statement of the account, and that the parties fully settled and adjusted the same, finding due the plaintiff \$6,532.27, which sum was paid by defendant and accepted by plaintiff; in consideration whereof Price executed and delivered to defendant the following instrument:

“Received from C. P. Treat \$6,532.27, in full settlement of the within contract and in full of all demands. In consideration of said payment already received by me, I hereby release him, and also the Fremont, Elkhorn & Missouri Valley R. R. Co., and the Chicago & Northwestern Ry. Co., from all claims, actions, or causes of action which have arisen or may or can arise to me against any or either of them by reason of any connection I may have had with them heretofore.

“Dated May 21, '86.

THOMAS PRICE.

“Witness: C. W. MOSHER.”

The reply, among other things, while admitting that plaintiff signed the receipt, denied that it was executed in full settlement, or that the money was received in settlement, and alleged that the money was paid and received merely on account, and with that agreement and understanding. Discussing these pleadings the writer of the opinion in 29 Neb. expressed himself to the effect that the acceptance of a portion of an undisputed claim not being a bar to an action for the

remainder, this case fell within that rule, because, to the extent of the payment made, the defendant admitted the amount to be due, and that this part was therefore not disputed; and the fact that plaintiff claimed a greater amount did not render the claim a disputed one. In this respect we think the former opinion was *obiter* and of no controlling force on the present hearing. The reply had put in issue the allegation that the money had been tendered and received in full satisfaction. Judgment had gone for the defendant on the pleadings, and the question before the court was only whether the written instrument set out was *prima facie* evidence alone or a formal contract, the terms of which were not open to contradiction by parol evidence. If the latter, then the reply, admitting the execution of the instrument, was in other respects immaterial; but if the instrument was merely a receipt and open to contradiction, then the reply sufficiently traversed the answer, and the judgment, in the absence of evidence, was wrong. That the court recognized this as the only question decided may be inferred from the fact that nothing else appears in the syllabus, as well as from the general current of the opinion itself.

The issue presented by these portions of the pleadings has now been tried. An instruction relating thereto was given at the request of the plaintiff, and one requested by the defendant was refused. The giving of the one and the refusal of the other are presented for review by appropriate exceptions and assignments of error. These instructions present sharply the different contentions of the parties as to the law on the subject, and we quote them. That given was as follows:

"The defendant claims in his answer that he has settled with the plaintiff and that he has paid him the full balance due him, through the Capital National Bank at Lincoln, Neb., and offers in evidence a receipt that was prepared by defendant and forwarded by him to the bank, together with an amount of money to be paid plaintiff, with instructions to the bank that the money should be paid over to plaintiff when he signed the receipt so forwarded with the money, which receipt is signed by the plaintiffs and purports to be a receipt in full of all claim on the part of plaintiff against defendant growing out of the contract here sued upon. You are instructed that the receipt so offered by the defendant is *prima facie* evidence of the fact stated therein, but is not conclusive. It places the burden upon the plaintiff to show by evidence to your satisfaction not only that the amount paid at the time the receipt was signed was not the actual amount due, but he must go further and show that at the time he signed the receipt and took the money he did not accept nor intend to accept the sum named in the receipt as a full settlement of his claim, and that he so notified the defendant, that such notice was given by him without unreasonable delay." The instruction refused was as follows: "You are further instructed that if you find from the evidence that the defendant Treat sent the \$6,532.27 to the Capital National Bank at Lincoln for the plaintiff Price at the request of the plaintiff Price, and that the defendant sent said money to said bank to be delivered to plaintiff only upon condition that the same should be accepted by him in full satisfaction and settlement of what was due from the defend-

ant to plaintiff under the contract sued upon in this action, and that the plaintiff Price, with knowledge of the fact that the defendant Treat so sent the money to be paid to him upon such condition, and thereafter accepted said money, that such acceptance would be a full and complete satisfaction, and he would not be entitled to recover in this action, notwithstanding he may, after receiving said money, have notified the defendant Treat that he did not receive or accept the same in full settlement but only to be applied upon account."

A short statement of the evidence applicable to the issue will elucidate these instructions. There is evidence tending to show that Price had requested Treat to remit through the Capital National Bank. Treat accordingly sent the sum named in the form of a draft to the bank, with a letter instructing the bank to pay the amount to Price, "in full settlement of all demands, but only upon his signing the receipt which I have written out for him upon the enclosed contract." The original contract for the work, bearing the receipt pleaded by the defendant, was enclosed together with the draft in this letter. Price had several conversations with Mosher, the president of the bank, and endeavored to get the money without signing the receipt, protesting all the time that a larger amount was due. He finally did, however, sign the receipt, and Mosher paid the money to him. But the same day he wrote the following letter, and delivered it to Mosher with the request that he remit it to Treat with the receipt:

"LINCOLN, 21st May, 1886.

"C. P. Treat, Esq., Chadron: I have this day signed the receipt on the contract between you

and me and delivered same to Capital National Bank. I sign this receipt subject to this condition, that any errors or mistakes in the classification of the work are to be corrected hereafter; also, any errors in measurements of the work or in the accounts you have sent me are to be corrected hereafter. I have never seen the vouchers upon which you base your charges against me, nor any of the orders for goods which you have charged against me, and if these accounts are not correct, I shall hold you for the balance due me. I wish you to send these orders and vouchers to the bank here or to me, so I can examine them in connection with your accounts. If there are any errors in these accounts, they must be corrected. I am satisfied there is yet a large sum due me from you on account of wrongful classification of work, wrong measurements, and wrongful and unwarranted charges against me for goods and labor. I do not propose to be bound by any receipts unless I am paid all that is justly due me.

“Yours truly,

THOS. PRICE.”

In view of this evidence it will be observed that by the instructions requested, both sides, notwithstanding the *dictum* in the former report, conceded that an acceptance of the amount tendered, in full satisfaction, would be a valid settlement and discharge of any claim; and this is right. The doctrine that a debt is not discharged by the receipt, even ostensibly in satisfaction, of a smaller amount, is based on the fact that there is in such case no consideration. (*Pinnel's Case*, 5 Coke [Eng.], 117; *Cumber v. Wane*, 1 Str. [Eng.], 426.) It does not apply to the case of a disputed claim. (*Slade v. Svedeburg*, 39 Neb., 600; *Tanner v. Merrill*, 65 N. W. Rep. [Mich.], 664; *Bull v. Bull*, 43 Conn.,

455; *McDaniels v. Lapham*, 21 Vt., 222; *Alvord v. Marsh*, 12 Allen [Mass.], 603; *Easton v. Easton*, 112 Mass., 438; *King v. City of New Orleans*, 14 La. Ann., 389; *Donohue v. Woodbury*, 6 Cush. [Mass.], 150; *Hills v. Sommer*, 53 Hun [N. Y.], 392; *Reynolds v. Empire Lumber Co.*, 85 Hun [N. Y.], 470; *Fuller v. Kemp*, 138 N. Y., 231; *United States v. Adams*, 7 Wall. [U. S.], 463; *United States v. Child*, 12 Wall. [U. S.], 232.) In some of these cases the old rule is stated to apply to liquidated claims, and the distinction is made between claims that are liquidated and those which are not. The term "liquidated," when used in this connection, means one where the amount due has been ascertained and agreed upon by the parties, or is fixed by operation of law. (*Hargroves v. Cooke*, 15 Ga., 321. See, also, Anderson's, Sweet's, and Bouvier's Law Dictionaries, where similar definitions appear.) In this sense this claim was not liquidated. The contract fixed different prices for excavating solid rock, loose rock, and earth, and while the parties substantially agreed as to the total amount of excavating, the classification of the work was in dispute, so that the amount due was not settled or agreed upon by the parties, nor was it fixed by operation of law; but could only be determined by a future agreement or by proof as to the amount of each class of work. Nor do the adjudicated cases support the *dictum* in the former opinion, to the effect that where only the amount admitted to be due is paid, so far the claim is within the rule as one liquidated or not disputed, notwithstanding the plaintiff claims a greater amount. In many of the cases cited the amount tendered was precisely the sum admitted to be due. If a consideration is in such case necessary, it may be found in

the fact that the payee receives immediate payment of so much as is paid, without the expense, delay, or labor of an accounting, in or out of court; and avoids thereby threatened litigation, which, we think, is always considered a valuable consideration. It has been necessary to consider this broad question, notwithstanding the fact that both instructions seem to have been based on a similar theory of law, because if the law were in accordance with the *dictum* referred to, the instruction given at plaintiff's request would be more favorable to the defendant than was warranted; and any erroneous statements therein would be for that reason without prejudice. The fundamental difference in the instructions was that that given permitted a recovery if a greater amount was in fact due, and if the plaintiff did not intend to receive the sum named in full settlement, and without unreasonable delay notified the defendant; while the instruction refused bound the plaintiff if he accepted the money knowing that it was tendered only upon the condition that it should be received in full satisfaction. The latter rule is correct. When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may at that time or afterwards make to the contrary. (*Fuller v. Kemp, supra*; *Reynolds v. Empire Lumber Co., supra*; *Donohue v. Woodbury, supra*; *McDaniels v. Lapham, supra*.) This principle is so clear and so well supported by authority that no discussion seems necessary. It was not, there-

fore, the defendant's intention, secret or express, when he received the money, which controlled the legal effect of the transaction. It was the condition attached to the tender of the money, which condition was accepted by the fact of his receipt. So that neither defendant's verbal protests to the bank nor his written declaration to the plaintiff could change the legal effect of his act.

It may be said that there is evidence tending to show that the bank or Mosher was plaintiff's agent for the purpose of paying the money, as there is also evidence tending to show that Mosher informed defendant that his signing the receipt would not affect his legal rights; that, therefore, Mosher's paying the money in the face of defendant's protest that a larger sum was due, was a waiver of the condition. But the answer to this is that Mosher had no authority to waive the condition. His instructions were absolute to pay the money only in full settlement, and on the signing of the receipt. It is true that the evidence is conflicting as to whether plaintiff was shown this letter. But it is immaterial whether it was shown him or not, because the receipt itself and Mosher's requirement that it should be signed was sufficient notice to the plaintiff that Mosher had no other authority and could not waive the condition. We think the instruction requested by defendant should have been given, and that requested by plaintiff refused.

REVERSED AND REMANDED.

47	886
49	450
50	702

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. GEORGE M. WRIGHT ET AL.

FILED APRIL 7, 1896. No. 6480.

1. **Negligence: PLEADING.** An allegation of negligence in a pleading is like one of fraud,—a mere conclusion. The facts from which the inference of negligence arises must be pleaded.
2. ———: ———: **INSTRUCTIONS.** It is error to submit to the jury an issue of negligence not raised by a pleading of specific facts.
3. **Railroad Companies: DUTY OF ENGINEER: INJURY TO LIVE STOCK: NEGLIGENCE.** It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced.

ERROR from the district court of Saunders county. Tried below before WHEELER, J.

The facts are stated by the commissioner.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error:

Railroad companies are under no obligations to stop their trains, or to slacken the speed, in order to deliver trespassing animals from peril. It was not the duty of the engineer to keep a lookout for cattle. (*Smith v. Chicago, R. I. & P. R. Co.*, 34 Ia., 509; *Meyer v. Midland P. R. Co.*, 2 Neb., 319; *Kilpatrick v. Richardson*, 37 Neb., 731; *Union P. R. Co.*

v. Mertes, 35 Neb., 204; *Illinois C. R. Co. v. Noble*, 32 N. E. Rep. [Ill.], 684; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 375; *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill., 640; *Illinois C. R. Co. v. Godfrey*, 71 Ill., 500; *Kansas City, L. & S. K. R. Co. v. Bolson*, 14 Pac. Rep. [Kan.], 5.)

R. S. Norval, contra:

It is the duty of an engineer to keep a proper lookout for cattle on the track, and the company is liable for damages where stock is killed through a failure to perform that duty. (*Toledo, P. & W. R. Co. v. Bray*, 57 Ill., 514; *Chicago & A. R. Co. v. Kellam*, 92 Ill., 245; *Baker v. Chicago, B. & Q. R. Co.*, 73 Ia., 389; *Missouri P. R. Co. v. Vandeventer*, 28 Neb., 117; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 101; *Virginia M. R. Co. v. White*, 34 Am. & Eng. R. Cases [Va.], 22; *Guenther v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 47; *Reilly v. Hannibal & S. J. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 81.)

IRVINE, C.

The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges, or attempts to allege, three grounds of recovery: First, that a gate on one of the fences along the right of way was insufficient and negligently permitted to be out of repair, and that by reason of those facts the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company,

after the stock was injured, took possession of the dead bodies and the injured cattle and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway company was a series of denials, some of them negatives pregnant, but the whole effect practically that of a general denial, coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiff. From a verdict and judgment in favor of the plaintiff for \$569 the defendant prosecutes error.

Many assignments of error relate to rulings on the admission of evidence and to the refusal of instructions with regard to the character of the gate and the duty and liability of the railway company concerning the gate and flowing from its condition. The railway company is not, however, in any position to complain of these rulings. The statutes on the subject are found in Compiled Statutes, chapter 72, article 1, sections 1 and 2. The court, after stating the issues, stated to the jury the substance of the statute, and then charged the jury that the duty was imposed by statute of erecting and maintaining gates, opens, or bars at private crossings, only with regard to adjoining proprietors, and that if the cattle were upon the premises of an adjoining proprietor, without his consent, and escaped therefrom upon the right of way without negligence of the defendant, and were killed without its negligence, there could be no recovery. The evidence was uncontradicted that the cattle of the plaintiffs, about 340 in number, were in a corral north of the railway and west of the land of one Wallen; that they escaped from the corral upon the land of Wallen,

and thence came through the gate in question upon the right of way. There was no evidence of any act of the railway company leading to their escape. Therefore the effect of this instruction was to absolutely prevent a recovery on the ground of a violation of the fencing law. Whether or not the court correctly interpreted the statute, we need not and cannot here consider, because the construction given it was so favorable to the railway company that under the evidence all question of liability thereunder was eliminated from the case; nor need we extensively consider any questions raised by the pleadings and proof as to the defendant's taking possession of the dead and injured cattle and converting them to its own use. On the trial of the case this issue was evidently a minor consideration. We think there was error on another feature of the case, and the evidence not being of such a character that on this issue it was the only one which could properly be rendered, if not in direction, at least in amount, we pass over such assignments as relate exclusively to it.

It is quite clear under the instructions of the court that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case the allegations of the petition are that the defendant, "by its agents and employes, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * that the said defendant carelessly and negligently, by its employes and ser-

vants in operating said train, ran their said engine and train in, over, and upon said plaintiffs' stock; when by exercising proper care and skill in the management and handling of its said engine and train, it could have stopped said train long before striking said plaintiffs' stock." An allegation of negligence or want of care is like an allegation of fraud. It is a bare conclusion. A pleading is not sufficient which merely in general terms charges a want of due care or negligence. It is necessary to plead the facts from which an inference of negligence arises. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *Malm v. Thelin*, 47 Neb., 686.) The petition merely alleges that the defendant negligently ran over the stock, while by the use of proper care it might have stopped the train before striking the cattle. The evidence shows that there were about 340 cattle on the right of way. It tends to show that while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades, or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after seven o'clock in the morning of December 15. Some of the witnesses testify that it was a clear morning and quite light at that time. Others testify that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that if the engineer saw the cattle, or by the exercise of due care should have seen them in time to have stopped the train and avoid the accident, the company was liable for his not doing so. The railway company contends that the allegations of the petition were in these respects insufficient, and also that the duty of the

railway company was only to exercise ordinary care to avoid injuring the cattle after those in charge of the train actually saw them. On the first contention, we think the railway company was right; on the second, wrong. The second argument is based on those cases—respectable in number, if in nothing else—which hold that a railway company's duty to a trespasser is merely to avoid wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply; but the rule in this state is that it is the duty of the railway company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of trains must exercise reasonable care to avoid injuring all persons who are known or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. (*Chicago, B. & Q. R. Co. v. Grablin, supra*; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660.) Therefore we think that there was no error in the statement that if the engineer in the exercise of ordinary care would have seen the cattle in time to have prevented the injury, it was his duty to do so, and the company was liable for a failure in that regard; but applying the rule already stated in regard to pleading, it is not alleged that the cattle were seen, or that by the exercise of such reasonable care as was consistent with the duties

of the engineer, they might have been seen. While from the evidence we think it is a fair inference that an immediate stop of the train would have been dictated by ordinary prudence on discovering 340 head of cattle on the right of way, the failure to slacken speed is the only fact alleged in connection with the charge of negligence. Whether or not it was the duty of the engineer to stop his train would depend upon other circumstances which are not pleaded. Trains must run, and run at considerable speed, even on misty mornings before daylight, and no inference of negligence can certainly be drawn from the fact that a train was running at a high rate of speed and might have been stopped before trespassing cattle were injured, when there is not a showing of facts raising a reasonable inference that it was the engineer's duty to stop or to exercise some other precaution. If, as plaintiff's evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop, if he could, then the inference of negligence would be reasonable; but such facts or similar facts are not pleaded and the proof cannot extend the scope of the pleadings. We think, therefore, while the instructions were correct as abstract statements of law, they submitted to the jury an issue not within the pleadings, and for that reason the judgment must be reversed, with directions to permit plaintiff to amend his petition if he desires.

REVERSED AND REMANDED.

BERNARD H. POST V. ROBERT H. OLMSTED, ADMINISTRATOR.

47 893
57 577

FILED APRIL 7, 1896. No. 6473.

1. **Death by Wrongful Act: DAMAGES: VERDICT FOR PLAINTIFF.** Evidence in an action by an administrator for injuries causing the death of his decedent examined, and held sufficient to sustain the verdict.
2. ———: ———: ———: **EVIDENCE.** A verdict of \$2,400 in such a case held not so clearly excessive as to warrant a reversal, where the deceased was a boy seventeen years old, a competent compositor, able to earn four dollars a day, and his next of kin his father, forty-six years old, a poor man with four younger children, although there was no evidence that the son had as yet supplied his father with any considerable amounts of money.
3. **Review: ASSIGNMENTS OF ERROR.** Other questions raised not being supported by any sufficient assignments in the motion for a new trial or petition in error, not considered.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

Cowin & McHugh, Langdon & Clair, and M. V. Gannon, for plaintiff in error.

McCoy & Olmsted, contra.

IRVINE, C.

This was an action by Olmsted, as administrator of William Allen Daniel, deceased, to recover from Post for injuries causing the death of plaintiff's decedent, alleged to be due to the negligence of the defendant. There was a verdict and judgment in the district court for the plaintiff for \$2,400 which the defendant seeks to reverse.

We designate the parties as they appeared in

the district court. The plaintiff, in a very elaborate brief, urges a number of technical objections to the record, which, he claims, preclude us from an examination of any of the errors assigned. The points so raised are so numerous that we pass them over without a detailed consideration, inasmuch as a consideration of the case on its merits, so far as is permitted by already well settled rules of practice, requires an affirmance of the judgment.

Complaint is made of certain rulings of the trial court on the admission of evidence. These we cannot consider, as there is no assignment in the petition in error presenting such questions.

Complaint is also made of certain instructions given by the court. In the motion for a new trial, and also in the petition in error, the only assignment with reference to these instructions is that "the court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, which was duly excepted to at the time by the defendant." Under a well established rule, this assignment can be considered no further than to ascertain that one of those complained of was correct. It is at once apparent from an examination of the charge that a number were free from error. So this assignment must fail.

Another assignment is that the court erred in not giving instructions 1 and 2 asked by the defendant. No such instructions appear in the record.

A further assignment is that the court erred in overruling the motion for a new trial. As the motion for a new trial assigns six grounds, and no one is designated in the assignment in the petition in error, this presents nothing for review.

The remaining assignments are that the verdict is not supported by sufficient evidence and that it is contrary to law. It is not contrary to law if supported by sufficient evidence. The evidence tends to show that the defendant was a dairyman, using in his business a number of teams and wagons. In January, 1891, two of these wagons, loaded with malt, were being drawn along Seventeenth street in Omaha, each propelled by three horses hitched abreast of one another. The plaintiff's decedent, a boy seventeen years of age, was riding upon a hand sled attached to the rear of the foremost wagon. The horses attached to both wagons were walking; but the rear wagon was approaching the front wagon. It continued to draw nearer until one of the horses attached to the rear wagon stepped upon the dragging coat of the boy, which pulled him from the sled. The horses and wagon then passed over him, inflicting injuries which resulted in death. There is evidence tending to show that for some distance before the accident occurred, the horses attached to the rear wagon were close behind the boy; that the boy shouted to the driver to stop, and that bystanders also shouted to the driver and warned him of the danger; that the driver kept on, regardless of these warnings, until the accident, and continued without stopping until bystanders interfered. Admitting, as argued by the defendant, that the boy's action in placing himself in such a position was negligent, still there is ample evidence from the foregoing facts that, notwithstanding such negligence on his part, the driver of the rear wagon ascertained his perilous position, and could have drawn his team aside or stopped it, or slackened its pace, in time to have

avoided the injury, and that ordinary prudence would have required such a course. There is ample in the evidence to show not only negligence causing the injury subsequent to the contributory negligence of the boy, but even wanton and criminal recklessness on the part of the driver. There is also sufficient to justify the jury in finding that this reckless disregard of the boy's safety continued after a period, when, by reason of the near approach of the horses, it had become impossible for the boy to extricate himself from his dangerous position.

It is also claimed that the evidence is insufficient to sustain the amount of the verdict. Conceding, contrary to several decisions of this court, that this question can be raised under a general assignment of the insufficiency of the evidence to sustain the verdict, we do not think the verdict can be declared excessive. The boy was seventeen years of age. He was a subcompositor on a daily paper, and stood next in line for a permanent position. Within a month before his death, he had earned in one night, \$6.16, in six nights, \$22.16, and in three nights, \$9.24. The foreman testified that his earning capacity was about \$4 per night on an average. The evidence tends to show that he was not only a competent compositor, but that he was of naturally industrious and economical habits. His expectancy of life, as shown by the evidence, was more than forty-three years. His next of kin was his father, forty-six years old, with an expectancy of twenty-four, a poor man, with four children younger than the deceased. While it is not shown that he had yet contributed any considerable amount to his father's support, we think that the legal relations

Buffalo County Nat. Bank v. Gilcrest.

and other facts in evidence were sufficient to sustain a verdict for the amount rendered. The pecuniary damage to the next of kin is always more or less a matter of estimate if not of conjecture; and under acts similar to ours, similar verdicts have been often sustained under slighter proof of expectancy. (*Union P. R. Co. v. Dunden*, 37 Kan., 1; *Johnson v. Chicago & N. W. R. Co.*, 64 Wis., 425.)

JUDGMENT AFFIRMED.

BUFFALO COUNTY NATIONAL BANK V. CLEM V.
GILCREST ET AL.

FILED APRIL 9, 1896. No. 6290.

Conflicting Evidence: REVIEW. The only question presented being one of fact, as to which the evidence is conflicting and apparently evenly balanced, the finding and judgment of the district court should not be disturbed.

ERROR from the district court of Buffalo county.
Tried below before HOLCOMB, J.

H. M. Sinclair, F. G. Hamer, and Dryden & Main,
for plaintiff in error.

Marston & Nerijs and R. A. Moore, contra.

POST, C. J.

This was an action by the plaintiff in error in the district court for Buffalo county on the following instrument:

“\$9,875.00. KEARNEY, NEB., Sept. 14th, 1889.

“Ninety days after date, for value received, I promise to pay to the order of the Buffalo County

National Bank ninety-eight hundred seventy-five dollars at the Buffalo County National Bank, Kearney, Nebraska, with interest at the rate of ten per cent per annum from maturity until paid.

“Interest paid to December 20th, 1889.

“CLEM V. GILCREST.”

On the back of said note are the following indorsements:

F. H. GILCREST.

“A. T. GAMBLE.

“E. B. JONES,

“\$5,775.00 paid December 21st, 1889.

“\$3,300.00 paid December 30th, 1889.”

The defendants Jones and F. H. Gilcrest joined in an answer which is here set out: “That on or about the 1st day of July, 1888, the defendants F. H. Gilcrest and E. B. Jones, upon the representations and at the solicitations of their co-defendant, A. T. Gamble, then an officer and cashier of the plaintiff bank, and upon his representations that the capital stock of the ‘Central Nebraska Live Stock Insurance Company’ that subsequently they, with the said A. T. Gamble and others hereinafter named, became the owners of the whole of the capital stock of said company; that under the laws of the state of Nebraska the insurance company was required to have \$50,000 of paid up capital stock before commencing business; that after the purchase of said stock it became necessary to reorganize said company and take up the old stock and pay in the said sum of \$50,000 as the amount required of paid up capital stock; that to make up said required amount the defendants, F. H. Gilcrest, E. B. Jones, together with their co-defendant, A. T. Gamble, and one B. H. Goulding deposited with the plaintiff their notes as follows: One of the said A. T. Gamble

for \$12,500, one of the said E. B. Jones for \$12,500, one of B. H. Goulding for \$12,500, one of F. H. Gilcrest for \$12,500, each and every one of which said notes the said plaintiff gave to the said insurance company a credit of \$50,000 on the books of the plaintiff as the amount necessary to show paid up capital stock in compliance with the law; that subsequently and as soon thereafter as the necessary arrangements could be made there was substituted for the said notes deposited as aforesaid first mortgage securities to the amount of about \$40,000, and the said note sued on in this case was then given to make up the balance of the said \$50,000; that no money was ever advanced by the plaintiff upon the said note, or was it ever intended or expected by the plaintiff or the makers of said note that any money should be paid thereon, but that as fast as first mortgage securities belonging to these defendants should be deposited with the treasurer of said company, their amounts should be indorsed upon said note, and when sufficient had been deposited as aforesaid to equal the face of said note, the note should be delivered up to the makers thereof and canceled; that in pursuance of said arrangement and agreement there was indorsed upon said note on December 21, 1889, \$5,775, and on the 30th day of December, 1889, there was paid and should have been indorsed upon the said note the sum of \$4,200, but there was only indorsed, as appears by copy of said note, the sum of \$3,300 on that date; and these defendants aver that there was no consideration moving from the plaintiff to the makers of said note, nor did either of the makers thereof ever receive any money or value therefor, except as above set out."

To the foregoing answer a reply was interposed which is in substance a general denial. Upon the issues thus joined there was a trial to the court, a jury being waived, resulting in a finding and judgment for the defendants therein, which it is now sought to reverse by means of this proceeding.

Practically the only contention at this time on the part of the plaintiff in error is that the finding is unsupported by the evidence. By a close scrutiny of the answer it will be observed that the substantial defense, indeed, the only defense there stated, is that the indebtedness to the bank had been extinguished by means of mortgage securities delivered to and accepted by the latter in payment of the note in suit.

We have carefully read over the evidence, which is, to say the least, conflicting and apparently evenly balanced, but which is quite sufficient under the rule often recognized by this court to sustain the finding complained of. The judgment of the district court is

AFFIRMED.

**BENJAMIM A. GIBSON, APPELLEE, V. SAM MCCLAY,
SHERIFF, ET AL., APPELLANTS.**

FILED APRIL 9, 1896. No. 6416.

- 1. Judgments: JOINT DEFENDANTS: AGREEMENT TO EXHAUST INDIVIDUAL PROPERTY: EXECUTION: INJUNCTION.** The agreement in this case, quoted in full in the opinion, construed to be one by which the judgment creditor bound himself to first make levy, or cause it to be made, on the property of a designated one of the judgment debtors, within the jurisdiction of the court in which the judgment was rendered and to sell or exhaust the prop-

Gibson v. McClay.

erty of this particularly specified debtor for the satisfaction of a balance of the judgment remaining unpaid, before resorting to or causing levy of execution to be made on property belonging to either of the other debtors.

2. **Injunction: EXECUTION: WRONGFUL LEVY.** *Held*, That injunction was the appropriate and proper remedy for an attempted violation of the agreement, consisting of a levy and proposed sale of the property of one of the debtors favored by its terms, when it appeared at the time there was property of the debtor, from whose property the judgment was first to be satisfied, within the jurisdiction of the judgment court and subject to execution.
3. **Executions: INJUNCTION: ESTOPPEL.** Certain acts and statements of one of the favored debtors reviewed and *held* not to constitute a waiver of his rights under and by virtue of the agreement, or to estop him from asserting them.
4. ———: ———: **Costs.** The decree *held* not to be objectionable as restraining the levy and enforcement of the execution in the part thereof with reference to the costs of the case in which the judgment was rendered.
5. ———: ———. The decree and injunction thereby accorded *held* too broad in that it restrained the sale of any of the property of the one debtor until all the property of the other was exhausted, and that it should have been confined to restraining a levy or sale under the execution herein involved and to this extent it is modified and, as modified, affirmed.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J.

E. R. French, for appellants.

Wooley & Gibson, contra.

HARRISON, J.

On or about July 20, 1890, Alexander S. Porter, one of appellants herein, recovered a judgment in the district court of Douglas county against Ben-

jamin A. Gibson, appellee in the case at bar, Jonathan Chase and Joseph M. Beardsley, in the sum of \$15,000. September 25, 1890, appellee paid on the judgment mentioned the sum of \$5,055, and at the time of such payment an agreement was entered into which was as follows:

“Received on this judgment from Benjamin A. Gibson the sum of five thousand and fifty-five dollars (\$5,055), being a third of the principal sum and interest to date. Also received of Joseph M. Beardsley the sum of five thousand two hundred and sixty-two and 25-100 dollars (\$5,262.25), the same being a certified check payable April 28, 1891, the same to be credited on said judgment when said check is paid. The said defendants to pay the costs to the clerk. In consideration of said payment plaintiff agrees to stay, and not issue, any execution on said judgment or file any transcript thereof in any county prior to the first day of February, 1891, at which time it is agreed that the Jonathan M. Chase’s third part of said judgment, the sum of five thousand dollars (\$5,000), principal sum and interest to that date, shall be paid, and if the same is not then paid execution may issue for that sum but no more until the 28th day of April, 1891. All parties to said judgment hereby sign and agree to this agreement, and all error and appeal from the aforesaid judgment is hereby waived by both plaintiff and defendants. If execution is issued for Chase’s part of said judgment, it shall first be levied off from his property and next off from the property of Benjamin A. Gibson before Beardsley’s property is levied upon and exhausted, and in case Beardsley’s said check and share shall not be paid and execution is issued, the same shall be made off his property

before that of the other defendants is levied upon and sold."

December 16, 1891, an execution was issued to enforce the judgment and directed and forwarded to the sheriff of Cass county where Jonathan Chase resided, which was returned, no property of Jonathan Chase found whereon to levy. Subsequently, of date March 8, 1892, another execution was issued and forwarded to the sheriff of Lancaster county, ordering a levy to be made on the property of Gibson, which order was obeyed and a levy made on some real estate belonging to appellee, and to obtain an injunction restraining the sheriff and defendant Porter from selling appellee's property until the property of Jonathan Chase should be first resorted to and exhausted, the present action was instituted. It was stated in one portion of the petition filed, that Jonathan Chase was the owner, at that time, of an undivided one-half interest in a tract of land in Lancaster county, of sufficient value to satisfy the balance remaining of the judgment. A temporary injunction was granted, and after a motion to vacate was heard and overruled, issues were joined and as the result of a trial the following findings were made and decree rendered and entered on the journal:

"This cause having been heretofore on a former day of this term of court, to-wit, March 17, 1893, tried and submitted to the court, now comes on for final determination and after due consideration and being fully advised in the premises, the court finds in favor of the plaintiff and against the defendants.

"The court further finds that the plaintiff and defendant Alexander S. Porter entered into the

written agreement set forth in the petition herein, wherein it was agreed by and between the said plaintiff and defendant Alexander S. Porter, in consideration of the payment of one-third of a certain judgment, interest and costs obtained by the said Alexander S. Porter against the said Benjamin A. Gibson, and one Jonathan Chase and Joseph M. Beardsley, in the district court of Douglas county, Nebraska, that the said defendant Alexander S. Porter was not to cause an execution to be issued against the property of the plaintiff Benjamin A. Gibson until the property of the said Jonathan Chase was exhausted.

"The court finds that the said Alexander S. Porter, in violation of said agreement, caused an execution to issue upon the judgment described in the petition herein and a levy was duly made upon the property of the said plaintiff, without previously exhausting the property of the said Jonathan Chase, as the said Alexander S. Porter had agreed to do in said agreement.

"The court finds that the said Jonathan Chase was, at the time of the commencement of this action, and now is, the owner of property in Lancaster county, Nebraska, subject to execution, and that the said defendants should be, and hereby are, restrained and enjoined from levying upon the property of the said plaintiff under said judgment until the property of said Jonathan Chase shall have been exhausted.

"It is therefore considered and adjudged by the court that the said defendants be, and they hereby are, enjoined from levying upon the property of the said plaintiff Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant Alexander S. Porter as above set forth,

until all of the property of the said Jonathan Chase subject to execution shall have been exhausted, and that the said plaintiffs do have and recover of and from the said defendants the costs of this action taxed at \$21.85."

The agreement herein quoted may fairly be said to evidence a contract, on the part of the judgment creditor, to first collect any balance of the judgment from Jonathan Chase of the debtors, to the extent that the issuance, levy of execution, and sale thereunder might become necessary in the enforcement of its collection, and we think it not straining the terms of the agreement beyond their fair import to say it contemplated any property belonging to Chase within the jurisdiction of the court, and available by the proceedings mentioned, should be exhausted before recourse should be had to levy of process on property of the other debtors. This being, as we consider, a reasonable construction of the agreement, the issuance of an execution which, by its terms, was directed to be levied on the property of Gibson, as was the one the further effect of which it is herein sought to restrain, and its levy on the belongings of Gibson, and the contemplated sale thereof under the levy, at a time when there existed property of the debtor Chase within the county wherein the levy was made on that of Gibson, was a violation of the rights of the latter raised by the contract referred to, warranting the equitable remedy of injunction to stay its further progress. The evidence introduced established the fact that Chase was the owner of property in Lancaster county subject to execution, and the trial court made a finding to this effect.

It is claimed, however, that appellee, by actions and statements in relation to the judgment and its enforcement, had estopped himself from insisting on the fulfillment of the agreement. Mr. Gibson wrote some letters to the attorney for the appellant, Alexander S. Porter, in one of which, February 1, 1891, he remitted \$3,000 to apply on the balance due on the judgment, and in this he said: "Mr. Chase has failed to come to time with his payment on the judgment; and I enclose you herewith my check for \$3,000, for which receipt me, and also receipt on the docket and satisfy judgment to that extent. Chase promises me that he will pay the balance in course of a week or two; and I propose to let him if he will. I hope this will be satisfactory all around. I will pay the balance of \$5,000 if I can't make Chase do it. It will be something of an accommodation to me if execution does not issue for balance at once, as I want Chase to pay it if he can. If execution should issue under the circumstances I should be hot under the collar, of course; and Mr. Porter wouldn't get his money nearly as quick." February 19, 1891, Gibson sent the attorney \$2,000 to apply on the judgment, \$1,000 of which was by draft which was dishonored, or not paid when presented. There were some other letters from Gibson to attorney for appellant Porter, in reference to the balance due on the judgment, and the filing of a transcript of it in Lancaster county, and some protestations against any attempts being made to collect the balance in any manner other than as stated in the agreement. There was also testimony from which it appeared that Gibson was in Omaha on or about June 10, 1891, and while there met the attorney for the judgment creditor, and

in a conversation which then occurred, stated that Jonathan Chase, his co-defendant, had no property in Lancaster county. There was also evidence to the effect that Gibson informed the attorney, when in Omaha on the date last mentioned or soon thereafter and prior to the issuance of the execution against the service of which an injunction is sought in this action, that Chase owned an interest in some real estate in Lancaster county. There is other and further testimony on this same subject, but from an investigation of all of it we are satisfied that it was sufficient to sustain the findings of the trial court, and that there was nothing shown from which it can be said that the appellee waived his right to insist on the fulfillment of the agreement in regard to the enforcement of the judgment or estopped himself from demanding such fulfillment.

It is insisted by counsel for appellants that the execution in question was for the balance due on the judgment and for the costs, and that its further enforcement should not have been restrained to the extent it was, for the collection of the costs; that the agreement did not include an execution for the costs, hence the levy of this one was proper and should have been allowed to prevail for the amount of the costs. The agreement was that if execution issued for that part of the judgment which remained for Chase to pay, it was first to be levied upon his property. This we think broad enough to include any execution issued for the purpose indicated, notwithstanding there might be also stated in it the costs and a levy directed for their collection along with the balance due on the judgment. The execution levied, and against which the injunction was granted and became

operative, was for an amount due of the judgment and which, by the actions and agreement of the parties, was known as "Chase's part of said judgment;" that Chase was to pay or it was first to be collected from him, or his property first subjected to its payment, and as such it should have been first levied upon his property for all purposes, and further, from an examination of the decree it appears that the parties were only "enjoined from levying upon the property of said plaintiff, Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant, Alexander S. Porter, as above set forth, until all of the property of the said Jonathan Chase subject to execution shall have been exhausted."

It is further urged by counsel for appellants that the decree rendered in the case was too broad in that it restrained any levy of execution against Gibson's property until such time as all Chase's property should be exhausted, and that it should have been confined, in its scope, to the matters in issue in the present case, and more particularly to stopping the sale under the then existing execution and levy thereof. In this contention we agree with counsel and the decree will be modified so that the appellants will be enjoined from further enforcing the execution, or levy thereof, against the property of Benjamin A. Gibson for the purpose of applying the proceeds thereof in satisfaction of the balance due on the judgment in favor of Alexander S. Porter and against Benjamin A. Gibson, Jonathan Chase, and Joseph M. Beardsley, and as thus modified it is affirmed.

JUDGMENT ACCORDINGLY.

JAMES WHITCOMB ET AL. V. JACOB THOMAS.

FILED APRIL 9, 1896. No. 6440.

Sufficiency of Evidence: REVIEW. Where there was sufficient testimony to sustain the verdict it will not be disturbed.

ERROR from the district court of Thurston county. Tried below before NORRIS, J.

J. N. Curry, Barnes & Tyler, and Jay & Beck, for plaintiffs in error.

T. M. Franse, contra.

NORVAL, J.

James Whitcomb, Waldo Whitcomb, and Getty W. Donery are the proprietors of the Bank of Pender. Jacob Thomas commenced this action against them to recover the sum of \$129.14, with interest thereon, which he alleges to be the balance due him upon his open account with the bank. In their answer they deny that they are indebted to the plaintiff in any sum whatever, and allege that he is indebted to them upon account in the sum of \$13.85, and the further sum of \$1,357.60 upon three promissory notes executed by the plaintiff, and which are set out in the answer. The defendants asked judgment against the plaintiff for \$1,371.45, with interest. The reply denies that there is anything due from plaintiff to defendants on account, and pleads want of consideration as to a portion of the amount represented by the notes mentioned in the answer, and payment of the remainder of said notes. From a verdict and judgment for the

Lewis v. Mills.

plaintiff in the sum of \$78.70 the defendants prosecute error.

The only complaint in this court is that the verdict is contrary to the proofs adduced on the trial. A careful perusal of the testimony discloses that it is conflicting upon every material issue presented by the pleadings. The evidence of the plaintiff, when considered without reference to that introduced by the defendant, fully supports the verdict. It is the province of the jury, and not ours, to pass upon the credibility of the witnesses and to weigh the testimony. The verdict is not so manifestly contrary to the evidence as to show it to have been the result of either passion or prejudice, hence it cannot be set aside, and the judgment must be

AFFIRMED.

FRANK LEWIS V. W. W. MILLS ET AL.

FILED APRIL 9, 1896. No. 6413.

47	910
60	473
600	474

1. **Res Judicata: EXECUTION: WRONGFUL LEVY: JUDGMENT AGAINST OFFICER: ACTION ON BOND: DAMAGES.** Where an officer holding an execution issued on a judgment against A, by virtue of such execution seizes the property of B, and the latter recovers a judgment against such officer for the value of the property seized, then, in a suit by B against such officer and the sureties on his official bond to recover the amount of the judgment, such judgment is conclusive evidence against the officer and his sureties as to B's ownership of the property at the time it was seized by the officer, the amount of the damages and costs sustained by B by reason thereof, in the absence of a showing that the court had no jurisdiction to pronounce the judgment or that it was procured by fraud or collusion. *Thomas v. Markman*, 43 Neb., 823, followed.

2. **Sheriffs and Constables: ACTION ON BOND: PLEADING.** And in the suit against the officer and his sureties it is immaterial that the officer was not designated as such in the pleadings or judgment of the suit brought against him by the owner of the property.
3. ———: ———: ———: **EVIDENCE.** And the pleadings and judgment in the action brought by the owner against the officer are competent and relevant evidence in the suit against the officer and his sureties, although such pleadings and judgment show that the owner's suit against the officer was prosecuted and judgment rendered jointly against him and another.

ERROR from the district court of Madison county. Tried below before ALLEN, J.

Wigton & Whitham, for plaintiff in error.

References: *City of Lowell v. Parker*, 10 Met. [Mass.], 309; *Turner v. Killian*, 12 Neb., 580; *Lammon v. Feusier*, 111 U. S., 17; *Thomas v. Markman*, 43 Neb., 823; *People v. Mersereau*, 42 N. W. Rep. [Mich.], 153; *Dennie v. Smith*, 129 Mass., 143; *Tracy v. Goodwin*, 5 Allen [Mass.], 409.

Robinson & Reed, contra.

References: *Kane v. Union P. R. Co.*, 5 Neb., 107; *Fox v. Abbott*, 12 Neb., 330; *Lucas v. The Governor*, 6 Ala., 828; *Governor v. Shelby*, 2 Blackf. [Ind.], 28; *White v. State*, 1 Blackf. [Ind.], 558; *Pico v. Webster*, 14 Cal., 202; *Carmichael v. The Governor*, 3 How. [Miss.], 236; *Bitting v. Moore*, 53 Ia., 593.

RAGAN, C.

The facts in this case are as follows: A judgment was recovered before a justice of the peace in Madison county against one Van Buren Lewis. Execution was issued on the judgment and deliv-

ered to one W. W. Mills, a constable of said county. Mills thereupon levied the execution upon certain personal property in the possession of one Frank Lewis, who held the possession of said property and claimed a lien upon it by virtue of a chattel mortgage executed to him by Van Buren Lewis. Mills sold the property to satisfy the execution. Frank Lewis subsequently brought an action in replevin in the district court of Madison county for this property against the constable and a man named Sesler, and in this action Mills was not named or sued as constable. The action proceeded as one for damages, and Lewis recovered a judgment against the constable and Sesler for the value of the property. Execution was issued on this judgment and returned wholly unsatisfied, and thereupon Frank Lewis brought this suit in the district court of Madison county against Mills, the constable, and the sureties on his official bond to recover the amount of the judgment and costs which he, Frank Lewis, had recovered against Mills and Sesler. Only the sureties of the constable filed answers to the action. Their answers in effect admitted that Mills was a duly appointed or elected constable; that he as principal and they as sureties duly executed said bond; that the property which he seized and sold under execution against Van Buren Lewis was the identical property for which Lewis subsequently recovered a judgment against the constable and Sesler. The sureties further pleaded as a defense to the action that the judgment of Lewis against Mills and Sesler was procured by fraud and collusion between Frank Lewis and the constable; that the property seized and sold by the constable was in fact and in truth the property of Van

Buren Lewis and known by Mills and Frank Lewis to be his property; that the mortgage held on such property by Frank Lewis was made by Van Buren Lewis to hinder, delay and defraud his creditors, to the knowledge of Frank Lewis and the constable, and that by conspiracy and collusion between Frank Lewis and Sesler and Mills the latter two neglected and refused to defend the action of replevin brought by Frank Lewis. When the case at bar came on for trial to a jury, Lewis, to maintain the issues on his part, offered in evidence the record of the judgment which he had obtained in the district court against Mills and Sesler. To the introduction in evidence of this record the sureties on the bond objected, the objection was sustained, and the offered evidence excluded. Lewis failing to produce any further evidence, the court directed a verdict for the constable and his sureties, on which a judgment dismissing Lewis' action was rendered, and he prosecutes to this court a petition in error.

The evidence offered was admissible and the court erred in excluding it. The judgment of Frank Lewis against Mills and Sesler was conclusive evidence against the constable and his sureties as to Frank Lewis' ownership of the property at the time it was seized by Mills, the amount of the damages and costs sustained by Frank Lewis by reason thereof, in the absence of a showing that the court which rendered that judgment had no jurisdiction to pronounce it, or that it was procured by fraud or collusion. (*Turner v. Killian*, 12 Neb., 580; *Pasewalk v. Bollman*, 29 Neb., 519; *Thomas v. Markman*, 43 Neb., 823.)

The fact that Mills was not designated or described as constable in the pleadings in the action

brought against him and Sesler by Frank Lewis was wholly immaterial. (*Dennie v. Smith*, 129 Mass., 143.)

The fact that Lewis' judgment in the replevin action was rendered against both the constable and Sesler did not affect the validity of the judgment as evidence against Mills and the sureties on his bond. The judgment rendered against Mills and Sesler was offered in evidence to show that Mills had wrongfully taken and converted the goods of Frank Lewis. The fact, if it was a fact, that Sesler assisted Mills in the wrongful conversion of these goods did not lessen the responsibility of Mills nor his sureties. (*City of Lowell v. Parker*, 51 Mass., 309.) The judgment of the district court is reversed.

REVERSED AND REMANDED.

J. G. SLOAN, SHERIFF, v. BRISON BAIN.

FILED APRIL 10, 1896. No. 6344.

1. **Trespassing Animals: DISTRAINOR'S LIEN: HERD LAW.**

One taking up stock trespassing upon his cultivated lands must, in order to preserve the lien allowed for his damages, comply substantially with the provisions of our herd law. (Compiled Statutes, ch. 2, art. 3.)

2. ———: ———: **NOTICE.** The question of the reasonableness of the notice required to be given the owner of stock so taken up, if known, is generally one of fact depending upon the circumstances of the particular case.

ERROR from the district court of Pawnee county. Tried below before BUSH, J.

G. E. Becker and W. W. Giffen, for plaintiff in error.

D. D. Davis and C. N. Mayberry, contra.

POST, C. J.

This was an action of replevin commenced before a justice of the peace for Pawnee county, from whence it was taken by appeal to the district court for said county, when a trial was had resulting in a verdict and judgment for Bain, the plaintiff therein, and which has been removed into this court for review by means of the petition in error of Sloan, the defendant below.

The facts out of which the controversy arose are, briefly stated, as follows: One George Gartner, in the month of March, 1892, took up certain cattle, the property of the defendant in error Bain, found trespassing upon his, Gartner's, cultivated land in Pawnee county. Fifteen days later he caused Bain to be served with notice of which the following is a copy:

“MAYBERRY, NEB., April 12, 1892.

“MR. BRISON BAIN: You are hereby notified that on the 28th day of March, 1892, I took up some stock that I listed as strays, and from information that I have received I am led to believe that they belong to you. I have ten now in my possession and they are described as follows,
* * * which animals did trespass upon my lands, and as I thought that the said animals were strays, I took them up as strays and listed them as required by law. The amount of damage said stock done I have placed at \$25. You are required to pay the above charges within forty-eight hours.

from the delivery of this notice, or said stock will be sold as provided by law. I have appointed Mr. W. F. Parker to act as arbitrator should you not feel satisfied with the amount of damage in the within notice. GEORGE GARTNER."

Bain, it appears, paid no attention to the foregoing notice, and Gartner in due time filed his claim, with proof of service, with Joseph Brown, a justice of the peace for said county, who found that the cattle in question had been taken up while trespassing upon Gartner's land and ordered them sold to satisfy the damage of the latter, assessed at \$25. A writ was thereupon issued to the defendant below, Sloan, commanding him as sheriff to sell said cattle as upon execution, but before the day appointed for the sale they were taken from his possession by virtue of the order of replevin in this cause. Gartner without doubt had a lien upon the cattle in controversy, when taken up by him, for the amount of his damage; hence our investigation involves a single inquiry, viz., whether such lien existed in his favor at the time this action was commenced. It has been frequently held that one taking up stock while trespassing upon his premises must, in order to preserve the lien allowed for his damage, comply substantially with the provisions of our herd law with respect to notice, etc. (Compiled Statutes, ch. 2, art. 3; *Haggard v. Wallen*, 6 Neb., 271; *Bucher v. Wagoner*, 13 Neb., 424; *Hanscom v. Burmood*, 35 Neb., 504.) Although, as said in the case last cited, notice must be given to the owner of stock so taken up, if known, within a reasonable time, the question is generally one of fact depending upon the circumstances of the particular case. And it cannot be asserted as a proposition of law

that the time in this case, fifteen days, is unreasonable, there being no evidence tending to prove knowledge by Gartner of Bain's ownership previous to the date of the notice above set out. There was proof of a tender by Bain before the commencement of this action of the sum of \$3 in satisfaction of Gartner's lien, but there was no evidence whatever tending to show the amount of the damage actually suffered by the latter. The evidence is entirely free from conflict and suggests no reason for holding that the statutory lien upon the cattle impounded has been discharged by act of Gartner or by operation of law. It follows that the right of possession of the property in controversy was at the time this action was commenced in the plaintiff in error. The judgment is accordingly reversed and the cause remand for further proceedings in the district court.

REVERSED.

JOHN CANNON ET AL. V. MARGARET SMITH.

FILED APRIL 10, 1896. No. 6221.

Pleading: VERDICT: EJECTMENT. A verdict in order to sustain a judgment must respond to the issues made by the pleadings, or to the allegations of the successful party.

ERROR from the district court of Greeley county. Tried below before HARRISON, J.

J. R. Hanna and T. J. Doyle, for plaintiffs in error.

M. B. Gearon, contra.

Post, C. J.

This was an action of ejectment in the district court for Greeley county in which judgment was entered in favor of the defendant in error, who was also defendant below, and which has been brought to this court for review by means of the petition in error of the unsuccessful party. The petition below is as follows:

"1. The plaintiffs, John Cannon and Ellen Cannon, complain of the defendant, Margaret Smith, for that the plaintiffs have a legal estate in and are entitled to the possession of the following described premises, to-wit: The east 200 feet of the northeast quarter of section 21, in township 18, range 11, situated in Greeley county, Nebraska, and the said defendant, ever since the 15th day of May, 1889, has unlawfully kept, and still keeps, the plaintiff out of possession of said premises.

"2. The defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the 15th day of May, 1889, to the commencement of this action, amounting to the sum of \$100. The plaintiffs therefore pray judgment for the delivery of the possession of said premises to them, and also for the sum of \$100 rents and profits, and for costs of suit."

To the foregoing petition an answer was filed in the following words: "Now comes the defendant by her attorney, M. B. Gearon, and for answer to plaintiffs' petition denies each and every allegation therein set forth, except that the plaintiffs are the owners in fee of said premises, which defendant admits."

The issues thus made were tried to a jury, by which the following verdict was returned: "We,

the jury in this case, being duly impaneled and sworn, do find and say that the plaintiff has not a legal estate in, and is not entitled to the possession of the premises described in the petition."

Numerous errors are alleged as grounds for a reversal of the judgment, but one of which will be noticed at this time. It is contended that the verdict responds to no issue of the pleadings and will not, therefore, sustain the judgment complained of. By a careful analysis of the pleadings it will be observed that the only question at issue was that of the possession of the defendant below, and as to which the verdict is silent. It would seem, therefore, that the objection is well taken, and that the district court erred in rendering judgment upon the verdict.

It is, however, strenuously insisted that the insufficiency of the verdict was not relied upon below. We observe in the record evidence tending strongly to corroborate that statement, although the question is presented by a sufficient assignment of the motion for a new trial, and also by the petition in error. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

HARRISON, J., not sitting.

OMAHA BREWING ASSOCIATION V. JOHN WUETH-
RICH ET AL.

FILED APRIL 10, 1896. No. 6388.

1. **Review: ISSUES NOT RAISED BELOW.** Cases will, as a rule, be reviewed in this court upon the theory upon which they are prosecuted or defended in the court of original jurisdiction.
2. ———: ———: **CONVERSION: RECOUPMENT: WAIVER.** One who in an action for the conversion of personal property defends upon the sole ground of his alleged superior title, and by his conduct disclaims any special interest in such property or lien thereon, will not, on petition in error in this court, be heard to complain on the ground that he should have been permitted to recoup the amount of a lien existing in his favor upon the property in controversy against the damages awarded for its conversion.

ERROR from the district court of Douglas county. Tried below before OGDEN, J.

Lake, Hamilton & Maxwell, for plaintiff in error.

F. W. Fitch, contra.

POST, C. J.

This was an action by the plaintiffs below, John Weuthrich and Margaret Wuethrich, against the defendant therein, the Omaha Brewing Association, for the conversion of certain property, consisting chiefly of saloon fixtures and furniture used by the plaintiffs in their business as saloon-keepers. The defenses relied upon were two in number: First, that said property was delivered to the plaintiffs by Storz & Iler, to whose rights the defendant has succeeded, under and by virtue of a written agreement by the terms of which the

title thereof remained in the said Storz & Iler until paid for in full, said agreement being in the following words:

“Articles of agreement, made and entered into, this 2d day of August, 1890, by and between Storz & Iler, parties of the first part, and Mrs. John Wuethrich, party of the second part, all of said parties being in the city of Omaha, county of Douglas, state of Nebraska, witnesseth:

“Said parties of the first part agree to sell, and said party of the second part agrees to purchase the following described property, situated in the county of Douglas and state of Nebraska, to-wit: All the fixtures and furniture belonging to the saloon and billiard hall, and also all the furniture belonging to the rooms in the second and third story of the three-story brick building situated on the southwest corner of Fifteenth street and Capitol avenue, in the city of Omaha, as described in an inventory hereto attached. The said Mrs. John Wuethrich agrees to pay to said Storz & Iler for said described personal property the sum of forty-five hundred (\$4,500) dollars, in payments as follows: One thousand (\$1,000) dollars on delivery of this contract; two thousand (\$2,000) dollars on the 15th day of November, 1890, according to one certain promissory note of even date herewith; fifteen hundred (\$1,500) dollars on the 15th day of May, 1891, according to one certain promissory note of even date herewith, both notes payable at First National Bank, Omaha, Nebraska, with interest at the rate of eight (8) per cent per annum from date.

“So soon as said purchase money and interest shall be fully paid, then, and in that case, Storz & Iler agree to make to said Mrs. John Wuethrich,

her heirs or assigns, a good and sufficient bill of sale of said personal property. In case the said Mrs. John Wuethrich shall fail, refuse, or neglect to pay said sums [notes], or any part thereof or interest thereon, she shall forfeit any rights she may have in this contract for the purchase of said property, and shall also forfeit any moneys she may have paid as herein stipulated to said Storz & Iler. * * * The said parties of the first part agree that whenever said Mrs. John Wuethrich has fully complied with this contract, they will transfer to her all their rights, interest, and title to the lease they now hold on said premises.

“Witness our hands and seal this 2d day of August, 1890.

STORZ & ILER.

“MARGARET WUETHRICH.

“JOHN WUETHRICH.”

It appears that the plaintiffs paid on said contract the sum of \$1,000 on the day of its execution, as therein stipulated, and also the sum of \$2,000 and interest maturing November 15, 1890. It is, however, alleged that they failed to pay the sum of \$1,500, with interest, which matured May 15, 1891, whereby they forfeited to the defendant the amounts previously paid by them, and from which it is argued that in seizing and disposing of the property above described the defendant merely asserted its right under said contract.

The second defense is an alleged agreement whereby the plaintiffs, on the 29th day of May, 1891, finding themselves unable to make payment of the sum of \$4,533.58, then due and owing by them to the defendant, turned over and delivered to the latter all of the property in controversy in satisfaction of their said indebtedness.

Upon a trial of the issues in the district court,

there was a verdict and judgment for the plaintiffs therein in the sum of \$1,678.19, and which has by appropriate proceeding been removed into this court for review.

Although the petition in error contains numerous assignments, counsel rely for a reversal of the judgment upon a single proposition, viz., that the defendant below was entitled to recoup, against the damage assessed in plaintiffs' favor, the unpaid portion of the purchase price of the property in controversy, and that the district court accordingly erred in approving of a verdict for the value of the property converted, with interest. There are, it must be confessed, authorities which appear to sustain the proposition that one holding a lien upon personal property is, in an action by the lienor for conversion thereof, entitled, even under a general denial, to have so much of such indebtedness as remains unpaid deducted from the amount which the latter would otherwise be entitled to recover, as bearing directly upon the question of damage. Such a case is *Cushing v. Seymour*, 30 Minn., 301. But we do not understand that case, or the authorities there cited, to hold that it is the duty of the court to direct the allowance of a credit in such case, upon its own motion, without any suggestion from the party entitled thereto, or, as in the case at bar, contrary to the theory upon which the defense was conducted. A rule frequently recognized by this court is that cases must be reviewed here upon the theory on which they are prosecuted or defended in the court of original jurisdiction. (See *Smith v. Spaulding*, 40 Neb., 339; *Norton v. Nebraska Loan & Trust Co.*, 40 Neb., 394; *Woodard v. Baird*, 43 Neb., 310.) The defendant, judging from the evidence

Crosby v. Ritchey.

in the record, not only failed to assert a lien upon the property in controversy, but appears to have disclaimed any such contention. We observe, for instance, the following offer shown by the bill of exceptions: "The defendant offers to the plaintiff and now makes a tender of a note of \$1,500, marked Exhibit 3 [admitted to be the note above mentioned], which was paid and satisfied by settlement between the parties as set up in the defendant's answer." The cause appears to have been submitted to the jury upon the precise theory indicated by the answer, and the verdict responds to every contention made by the defendant during the trial. Having elected to waive any lien it may have had upon the property by virtue of the original agreement, it will be required to pursue its remedy by an action on the note and will not be heard to complain on the ground that such lien was not recognized and enforced in this cause.

JUDGMENT AFFIRMED.

SAMUEL M. CROSBY V. J. T. RITCHEY.

FILED APRIL 10, 1896. No. 6395.

47	924
56	337

47	924
59	278

47	924
61	579

1. **Fraud: PLEADING.** In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient.
2. **Negotiable Instruments: FRAUD: CONSIDERATION: PLEADING.** Answer examined and held to charge a failure of consideration only and not fraud in the inception of the notes sued upon.
3. ———: **INDORSEMENTS: CONSIDERATION: BURDEN OF PROOF.**

Crosby v. Ritchey.

Where the only defense alleged in an action by the indorsee of a promissory note is the failure of consideration, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. (*Violet v. Rose*, 39 Neb., 660; *Kelman v. Calhoun*, 43 Neb., 157.)

ERROR from the district court of Cass county.
Tried below before CHAPMAN, J.

Beeson & Root, for plaintiff in error.

W. C. Sloan and *E. H. Wooley*, contra.

Post, C. J.

This was an action upon two promissory notes executed by the defendant in error, Ritchey, for \$75 and \$37.50 respectively, both payable to the order of A. T. McLaughlin and indorsed in blank by the payee. To the petition, which is in the usual form, the defendant below answered as follows: "The defendant for answer denies that he is indebted to plaintiff in any sum upon the pretended notes sued on, and avers that such notes were obtained by A. T. McLaughlin, as the president of the Omaha Medical Institute, without consideration and by fraud and false representations, in this, that as such officer or president of said institute he agreed to furnish medical services for six (6) months from about February 23, 1891, to August 23, 1891; that such service and medical attendance and advice were the only consideration for such pretended notes and a contract for such medical services and advice being made at same time, and are but one contract with the notes, and nothing was to be paid until such medical services had been done and completed; that such medical services being not done nor fur-

nished as so agreed, nor was anything done whatever, though requested to be done; that at the time such pretended notes were obtained this defendant was led to determine and did determine that the whole matter was but a contract for such medical services and attention to be given for in about six months' time. It now appears that all was but a scheme and a device to swindle and defraud this defendant. It is further averred that plaintiff is not an innocent owner of such pretended notes sued on, the plaintiff knew the consideration of said notes had failed before he obtained the same; that the plaintiff is really not the rightful owner and holder of such notes and the plaintiff has no right to sue this defendant." The reply is in effect a general denial. A trial of the issues thus joined was had, resulting in a verdict and judgment for the defendant below, which we are asked to reverse on account of alleged errors, to be hereafter noticed.

Among the instructions given by the court on its own motion, and to which exception was duly taken, are the following:

"2. In this case you are instructed that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that he is the owner and holder of the promissory notes in question for a valuable consideration, and that the burden of proof is upon the defendant to satisfy you by a preponderance of the evidence of the want of consideration for said promissory notes, and that the same were obtained from the defendant by fraud and deceit.

"3. You are further instructed that as a matter of law, if you find from the evidence that the plaintiff purchased the notes in controversy in

this action before the day the same became due and payable, and in the usual course of trade for a valuable consideration, without notice of any defense that defendant might have or claim to have thereto, that in such case your verdict should be in favor of the plaintiff, unless you further find from the evidence that at the time defendant signed said notes he was led by the fraud and artifice of the original payee or his agents, and that defendant was not guilty of any neglect whatever in signing the same."

The first question suggested by the assignment relating to the foregoing instructions is the character of the defense alleged. The answer appears to have been by the district court interpreted as charging fraud on the part of the payee in the inception of the notes. But in that view we are unable to concur, since a careful scrutiny of the answer fails to disclose any allegations of fact upon which to predicate the charge of fraud. Mere epithets and conclusions of fraud, without the statement of facts, constitute no basis for relief upon that ground. (*Tepoel v. Saunders County Nat. Bank*, 24 Neb., 815; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb., 137; *Thomas v. Thomas*, 33 Neb., 373.) The mere allegation is insufficient. Facts showing the fraud relied upon or from which it may be inferred must be stated. (*Leavenworth, L. & G. R. Co. v. Douglas County*, 18 Kan., 169; *Kinkead*, Code Pleading, sec. 607 *et seq.*)

Another rule recognized by this court is that fraud cannot be predicated upon a mere promise not performed, but in order to be available as a cause of action or defense it is essential that there be a false assertion with respect to existing matters. (*Perkins v. Lougee*, 6 Neb., 220.)

The most favorable construction of which the answer in this case is susceptible from the standpoint of the defendant below is that it charges a failure of consideration on account of the alleged neglect and refusal of the payee of the notes to render the promised medical service and attendance. The case is therefore governed by the rule recognized by this court in *Violet v. Rose*, 39 Neb., 660, and *Kelman v. Calhoun*, 43 Neb., 157, viz., that where the defense alleged in an action by an indorsee of a promissory note is the failure of consideration only, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. The direction of the court appears to conflict with the authorities here cited. First, in submitting to the jury the question of fraud in the inception of the notes, and second, in imposing upon the plaintiff below the burden of proving that he was a *bona fide* holder thereof. The other assignments relate to rulings of the court during the trial and present questions of practice only, which, in view of the conclusion stated, do not require notice at this time. But for reasons above stated the judgment will be reversed and the cause remanded for trial *de novo*.

REVERSED.

JOHN HOGUE V. CAPITAL NATIONAL BANK OF
LINCOLN.

FILED APRIL 10, 1896. No. 6339.

1. **Corporations: CORPORATE CHARACTER: COLLATERAL ATTACK: LIABILITY OF STOCKHOLDERS.** Where a corporation has had a *de facto* existence for a considerable time, its corporate character cannot be collaterally assailed by persons contracting with it in such capacity, relying upon its corporate credit, in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute it a technical *de jure* corporation.
2. ———: **LIABILITY OF STOCKHOLDERS: STATUTES: ABATEMENT.** The liability imposed by section 139, chapter 16, Compiled Statutes, as originally enacted, was penal in its character, and rights of action thereunder not reduced to judgment, abated with the repeal of said section without a saving clause. (Session Laws, 1891, p. 198, ch. 13.)

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

E. C. Lane, J. R. Scott, and J. H. Broady, for plaintiff in error.

Nightingale Bros., contra.

POST, C. J.

This was an action by the defendant in error, the Capital National Bank of Lincoln, in the district court for Sherman county to recover from the plaintiff in error Hogue, as a stockholder of the Sherman County Banking Company, the sum of \$10,272.65, being the face value of twenty-four notes sold by said last named corporation. Upon

the back of each of the notes so sold appears the following indorsement:

“For valuable consideration we hereby guaranty to the Capital National Bank of Lincoln, Nebraska, or its assignees, the payment of the within note, waiving protest and non-payment of the same.

“SHERMAN COUNTY BANKING COMPANY,
“By E. E. WHALEY, *Pt.*”

The ground of Hogue's alleged liability appears from the following statement of the petition:

“The said Sherman County Banking Company, on October 31, 1887, filed its articles of incorporation in the county clerk's office, and on November 1, 1887, commenced to transact business at Loup City, in said county, as a banking corporation, and continued to transact business as such until December 26, 1888, at which last date said banking corporation became wholly insolvent and made a pretended assignment for the benefit of creditors, and by assignment duly executed, conveyed all the corporate property of said banking company to Joseph F. Pedler, sheriff of said county. * * The said Sherman County Banking Company was not a legally incorporated company, but has failed to comply with the provisions of chapter 16, Compiled Statutes, entitled ‘Corporations,’ in relation to giving notice and other requisites of organization, and thereby subjected its stockholders to the liability imposed by section 139 of said chapter. Such failure to comply substantially with the law affecting and regulating corporations is more specifically as follows: (a.) The said Sherman County Banking Company wholly failed to publish notice of its incorporation or organization. (b.) The whole of the capital stock of said banking corpo-

ration was not subscribed at the time of commencing business on November 1, 1887, or at any time thereafter, as required by its articles of incorporation and by the general law. (c.) The whole of the capital stock of said corporation was not paid for at the time of commencing business, nor at any time thereafter. * * * (e.) The said Sherman County Banking Company wholly failed to post up in a conspicuous place at its place of business, subject to inspection, a copy of its by-laws and the names of all of its officers appended thereto, and wholly failed to make and govern itself by by-laws. (f.) Said corporation wholly failed to make and publish a quarterly statement of the assets and liabilities of said banking company, and to make and publish the annual notice of indebtedness required by law. (g.) Said banking company failed to keep a record of its corporate proceedings and its election of officers and board of directors, failed to open and keep a subscription book, failed to keep a stock ledger or stock transfer book, or any book in which the names of the said stockholders were entered and the amount held and owned by each stockholder, and thereby concealed from the creditors of said banking corporation, from the patrons of said bank, and from the public in general the fact that a large amount of the capital stock of said corporation was held and owned by insolvents and persons of doubtful solvency.

“By reason of the aforesaid failure to comply with the provisions of law as to notice and other requisites of organization as herein set forth, the stockholders of said Sherman County Banking Company became, and are jointly and severally, liable for all the debts of said corporation.”

A general demurrer to the petition was overruled and issues joined by answer and reply. A trial was had at a subsequent term, resulting in a verdict and judgment for the plaintiff below in the sum of \$14,865.81, and which has by appropriate proceeding been removed into this court for review.

It is unnecessary, in the view we take of the questions presented for determination, to notice the allegations of the answer and reply. Among the facts shown by the petition, proof, and record, and as to which there is no controversy, are the following: (1.) The Sherman County Banking Company had a *de facto* existence for more than a year, during which time the defendant in error had transactions with it in its corporate capacity amounting to many thousands of dollars, including the indorsements upon which it seeks to recover in this action. (2.) The cause of action alleged and relied upon in the district court is the failure of the banking company to comply substantially with the provisions of the statute in relation to the giving of notice and other requisites of organization, and not Hogue's primary liability as a stockholder of said corporation.

Counsel for the defendant in error, with a candor certainly to be commended, admit that the situation, from their point of view, is complicated by the repeal in 1891, without a saving clause, of section 139, chapter 16, of the general corporation law of the state, and in a brief of unusual merit insist that the repealing act should be given a prospective effect only, since to hold otherwise is to destroy vested rights, and accordingly violative of section 10, article 1, of the constitution of the United States. But whatever

view we might feel constrained to take of that subject as an original proposition, it cannot, we think, be longer regarded as an open question in this jurisdiction. Section 139, as originally enacted, reads as follows: "If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice and other requisites of organization, the property of all the stockholders shall be liable for the corporate debts." By section 2 of the act of 1891 the foregoing provision was amended to read as follows: "If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice and other requisites of organization, after the assets of the corporation are first exhausted, then the property of any stockholder shall be liable for the corporate debts to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto, the amount of capital stock owned by such individual." By section 3 the original section was repealed, and by section 4 it is provided that, "Whereas, an emergency exists, this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pending or hereafter brought in any court in this state." In *Globe Publishing Co. v. State Bank*, 41 Neb., 175, it was held, that where an attempt is in good faith made to organize a valid corporation, and such body actually exercises corporate functions for a considerable time unchallenged by the state, persons contracting with it in its corporate capacity, and in reliance upon its corporate credit, cannot hold stockholders thereof liable for its debts solely because, by mistake or omission not amounting to

fraud, some act is left undone which is essential to constitute it a *de jure* corporation. In *Kleckner v. Turk*, 45 Neb., 176, it was held that the liability imposed by section 139, as originally enacted, was for the omission of acts which are not conditions precedent to the commencement of business by a corporation, that such liability existed solely by reason of the provisions of said section, that it was in the nature of a punishment, and that the right of action thereby conferred, unless reduced to judgment, did not survive, but was destroyed by its repeal. Those cases we regard as decisive of the present controversy. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

JOHN H. GREEN V. JOSEPH BARKER ET AL.

FILED APRIL 10, 1896. No. 5888.

1. **Patent for Land: COLLATERAL ATTACK: EVIDENCE.** The presumptions arise from the existence of a patent evidencing a grant of land from the United States, that all acts have been performed and all facts have been shown to exist which are prerequisites to its issuance, and that the right of the party grantee therein to have it issue has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.
2. **Deeds: TOWN SITE ACT: EVIDENCE: EJECTMENT.** Where property has been conveyed under the provisions of the act of congress of May 22, 1844, which may be termed the "Town Site Act" (see 5 United States Statutes at Large, 657), by the United States to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee or the party author-

47	934
50	137

47	934
50	477

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ized by law to make the transfer, evidences the determination, by the party executing it, that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding.

3. **Office and Officers: EVIDENCE.** It is a presumption of law that every person performs his duty as an official until the contrary is shown.
4. **Deeds: ERRONEOUS REFERENCE TO STATUTE.** A correct designation, in a deed, of the legislative act under and by virtue of which it was executed, *held*, not essential to the validity of the deed.
5. **Evidence: RECORDS: IDENTIFICATION.** A page of a book was identified as a part of the records of the minutes of the meetings of the "Grandview Company." *Held*, Not an identification or foundation for its introduction as showing proceedings had by the board of trustees of the "City of Grandview."
6. **Deeds: EXECUTION BY TRUSTEE OF CITY: EVIDENCE: EJECTMENT.** Deeds were executed purporting to be conveyances of real property by the trustees of the city of Grand View, which were signed "A. B. Moore, chairman." *Held*, That without proof that A. B. Moore who signed the deeds was chairman of the board of trustees of the city of Grand View, the deeds did not evidence the transfer purported to be made.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

C. A. Baldwin and James M. Woolworth, for plaintiff in error.

References: *Mattis v. Boggs*, 19 Neb., 698; *United States v. Southern Colorado Coal & Town Co.*, 18 Fed. Rep., 273; *Abbott v. Omaha Smelting Co.*, 4 Neb., 418; *Morrill v. Taylor*, 6 Neb., 242; *Doody v. Vaughn*, 7 Neb., 31; *Robinson v. Mathwick*, 5 Neb., 255; *Irving v. Brounell*, 11 Ill., 402; *City of St. Louis v. Gor-*

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man, 29 Mo., 593; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 41; *Murphy v. Lyons*, 19 Neb., 691; *McGarock v. Pollack*, 13 Neb., 535; *Williams v. Lowe*, 4 Neb., 396; *Atkins v. Atkins*, 9 Neb., 202; *Yates v. Lansing*, 9 Johns. [N. Y.], 437; *Reynold v. Stansbury*, 20 O., 353; *Bloom v. Burdick*, 1 Hill [N. Y.], 130; *Burbank v. Ellis*, 7 Neb., 156; *Clark v. Titus*, 11 Pac. Rep. [Ariz.], 312; *Mills v. Paynter*, 1 Neb., 445; *Sumner v. Sterens*, 6 Met. [Mass.], 337; *Cooper v. Ord*, 60 Mo., 420; *La Frombois v. Jackson*, 8 Cow. [N. Y.], 611; *Field v. Boynton*, 33 Ga., 239; *Hannibal & St. J. R. Co. v. Clark*, 68 Mo., 371; *Lea v. Polk County Copper Co.*, 21 How. [U. S.], 494; *Rawson v. Fox*, 65 Ill., 200; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H., 253.

H. D. Estabrook and Edward W. Simeral, contra.

References: *Field v. Seabury*, 19 How. [U. S.], 324; *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S., 637; *Taylor v. Winona & St. P. R. Co.*, 45 Minn., 66; *Cofield v. McClelland*, 16 Wall. [U. S.], 331.

HARRISON, J.

The defendants in error instituted this, an action of ejectment, in the district court of Douglas county against the plaintiff in error. The petition filed was as follows: "And now come said plaintiffs and for cause of action against said defendant say: That said plaintiffs, as tenants in common with said defendant, have a legal estate in, are the owners in fee, and entitled to the immediate possession of the undivided interests hereinafter appearing of the following described real property, to-wit: The block or tract of ground known as the Stone Quarry Reserve, in the city of

Grandview, Douglas county, Nebraska, and so designated upon the map of Omaha as lithographed and published by Poppleton & Byers. Said Joseph Barker being the owner in fee of 19-100 of said property; John I. Redick, 1-100; George P. Bemis, 2-100; Lewis S. Reed, 4-100; Ferdinand Streitz, 14-100; Andrew B. Moore, 14-100; said Emma I. Jones, as widow of Henry O. Jones, deceased, who died intestate and without issue, of a life estate of 13-100 of said property; and the said Dana G. Jones, Eva S. Jones, and Patty A. Holton as the owners in fee of the 13-100 interest; said last three named parties being the sole heirs at law of said Henry O. Jones, deceased. But the plaintiffs aver that said defendant unlawfully keeps them out of the possession of said property, and deny the rights of plaintiff herein set forth. Wherefore plaintiffs ask judgment for the possession of the property and costs of suit." To this an answer was filed in behalf of plaintiff in error which first denied generally each and every allegation of the petition, also specifically traversed them and pleaded affirmatively as follows: "And further answering defendant says that this action ought not to be prosecuted against him, for the reason hereinafter stated, that is to say, that this defendant, and those under whom this defendant claims, have been in the actual, open, notorious, and hostile possession and occupation of said premises and all of it, claiming it as their own, for more than ten years next before the institution of this action. And the defendant pleads and relies upon the statute of limitation in such cases made and provided in bar of the plaintiffs' right of recovery herein; wherefore the defendant prays that he may be hence dismissed with judg-

ment for his costs in this action, and that he may have all other relief." To this there was a reply, a general denial. There was a trial before one of the judges of the district court and a jury, resulting in a verdict in favor of defendant in error as to the larger portion of the premises in controversy, upon which, after motion for new trial was heard and overruled, judgment was rendered. The case is presented here by error proceedings on behalf of the defendant in the trial court.

The defendants in error introduced in evidence a patent conveying from the United States to "The trustees of the city of Grandview, and as the proper corporate authority thereof, in trust for the several use and benefit of the occupants thereof according to their respective interests under said act of 23d May, 1844, and to their successors and assigns in trust as aforesaid," certain lands which included the tract in controversy in this case; also deeds signed by "A. B. Moore, chairman," and each containing a recital that it was the act of the trustees of the city of Grandview, by which there was purported to be conveyed certain undivided interests in the title to the Stone Quarry Reserve, together with other property, to parties who, according to the recitals of the deeds, had respectively become entitled to the conveyances; also conveyances from these last mentioned persons to others, and transfers were shown until the defendants in error had been reached, and the title to their respective interests vested in them. The several conveyances were objected to at the time they were offered in evidence. The trial judge instructed the jury in respect to the patent and deeds and what they established, as follows: "The plaintiffs have in-

roduced in evidence a patent from the United States to the trustees of the town of Grandview covering the premises in controversy, and claim title through conveyances received by them or their grantors from A. B. Moore, chairman of such board of trustees; and you are instructed that they have introduced record evidence showing a legal estate in themselves as set out in their petition, and are therefore entitled to recover, unless the defense of adverse possession has been established by the defendant." This was excepted to and is assigned for error.

In order to a proper understanding of the claims of plaintiff in error that the patent from the United States to the city of Grandview and the deed made by A. B. Moore, as "chairman," did not convey any title or were not evidence of such transfers, we deem it proper to set forth here portions at least of the act of congress to which allusion was made in the patent, and of the acts of the territorial legislature which were passed to carry into effect the law enacted by congress. The act of congress reads as follows: "Whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judges of the county court for the county in which such town may be situate, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town

and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by legislative authority of the state or territory in which the same is situated. *Provided*, That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town and be made in conformity to the legal subdivisions. * *

Provided, also, That any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect."

(5 United States Statutes at Large, ch. 17, p. 657.)

The territorial enactment to prescribe the rules and regulations, which was passed February 10, 1857 (see Session Laws, 1857, p. 133), is as follows:

"Section 1. That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful and be the duty, whenever required by the occupants and owners by deed of the lots within the limits of such town, for the corporate authorities of the town, if incorporated, and if not incorporated, then for the commissioners for the county in which such town may be situated * * * to enter at the proper land office the land so settled and occupied as a town site, in trust for the several use and benefit of the occupants and those holding by deed or otherwise, according to the laws of this territory.

"Sec. 2. After the purchase of such land as above described it shall be the duty of the mayor of the town, if incorporated, or if the town is not incorporated, then of the commissioners of the

county in which the town is situate, to make out, execute, and deliver to each person who may be legally entitled to the same a deed in fee simple for such part or parts, lot or lots of such lands as each person may be entitled to."

Section 3 makes provision for hearing and determining disputes between contesting claimants. Sections 4 and 5 we need not notice here. Section 6 provided for an appeal to the proper district court from a decision of a mayor or the commissioners. In 1858 an act was passed on this same subject which repealed the act of 1857. (See Laws of Nebraska, 1858, p. 266.) In sections 4 and 5 of the law of 1858 it was provided:

"Sec. 4. After the entry of the land settled upon and occupied as a town site, as hereinbefore prescribed, the corporate authorities or the county judge, as the case may be, having entered the land, shall cause public notice to be given of the fact of such entry by posting written or printed notice in at least three public places in the town, and no deeds for the land nor any part thereof shall be executed and delivered within the period of thirty days after the first day of the publication of such notice.

"Sec. 5. After the lapse of thirty days from the first day of the publication of such notice, the mayor of the town, or if there is no mayor, the chairman of the board of trustees, if such town is incorporated, and if the town is not incorporated, then the county judge of the county wherein the town is situated, shall on demand execute and deliver to each person who may be legally entitled to the same a deed in fee simple for the part or parts, lot or lots of such land as the person demanding may be lawfully entitled to."

In regard to a patent issued by the proper officers of the United States, it was observed in the case of *St. Louis Smelting Co. v. Kemp*, 104 U. S., 636: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." (*Polk v. Wendall*, 9 Cranch. [U. S.], 87; *Cofield v. McClelland*, 16 Wall. [U. S.], 331; *Moffat v. United States*, 112 U. S., 24, 5 Sup. Ct. Rep., 10.) The principle is also recognized in *Van Sant v. Butler*, 19 Neb., 351. The supreme court of Colorado has said on this same subject: "The doctrine announced was that the deed upon its face purported to have been issued in pursuance of law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon is that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: 'That the action of Downing in issuing the deed in question to

Hughes was a fraud upon the rights of plaintiff in this case, will hardly be questioned.' Whether this charge be true or not, the proposition that upon this ground the validity of the deed was examinable in an action of this character is in conflict with the leading cases on the subject. The doctrine is established by numerous decisions of the supreme court of the United States that, should the officers of the land department, in issuing a patent, err in respect to their duty as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if upon any state of facts the patent might have lawfully issued; and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent." (*Chever v. Horner*, 11 Colo., 72 and cases cited.)

It is settled doctrine, well supported by both authority and reason, that from the existence of the patent evidencing the grant the presumption arises that all the acts have been performed and all the necessary facts have been shown to exist by the party to whom it was made, which were prerequisites to its existence, and that the proper officers have examined and adjudicated the question of the right of the applicant, and the patent, the evidence of such determination, is unassailable collaterally. The patent in this case ran to the trustees of the city of Grandview, and the deeds, purporting to convey title to the various claimants of lots and undivided interests in the "Stone Quarry Reserve," were signed "A. B. Moore, chairman." The recitals of these deeds, or such as we need notice, were as follows:

"This indenture, made this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-nine, witnesseth: That whereas the congress of the United States passed an act entitled 'An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances,' approved May 23, A. D. 1844;

"And whereas the legislative assembly of the territory of Nebraska, under and in pursuance of said act of the said congress, passed an act entitled 'An act regulating the disposal of lands purchased in trust for town sites,' approved February 10, A. D. 1857;

"And whereas the trustees of the city of Grandview have paid for and received a title from the United States in trust for the occupants and owners of the lots and pieces of land in the city of Grandview and territory of Nebraska, which city it located upon—[Here follows a description of the land]:

"Now, therefore, by virtue of the power in said board of trustees vested by the two several acts as such trustees aforesaid, the said trustees of the city of Grandview, in consideration of the premises and of the sum of twenty-nine (being one-tenth of the costs of entry) dollars in hand paid, the receipt whereof is hereby acknowledged, do by these presents convey unto—[Here follows the name of the grantee and description of the property conveyed].

"In witness whereof I have hereunto set my hand this fifth day of March, A. D. 1859, by authority of the said board of trustees.

"ANDREW B. MOORE,
"Chairman."

It is argued by counsel for plaintiff in error that inasmuch as the instruments state that they are executed under and by virtue of the provisions of the act of 1857, this must be accepted as true and binding, and further, since the act of congress required the deeds to be executed in conformity to the rules and regulations prescribed by the legislative assembly of states and territories, and if not so executed they should be void and of none effect, and the territorial act of 1857 prescribed that the conveyances therein provided for should be made by the mayor of the town, if incorporated, and if not incorporated, by the county commissioners, these deeds, being executed by neither, were void unless the word mayor in the act be construed as a generic term, and as such to include the chairman of the board of trustees of a town or city, and if this last view be entertained, that it devolved upon the parties introducing the deeds, and whose success depended on their validity in order to establish it, to show that the chairman of the board of trustees of the city of Grandview possessed such authority and was empowered or required to perform acts and duties which usually appertain to the office of mayor of a city, and thus bring him within the scope of such appellation, viewed as a generic term. This argument is not tenable. It must be remembered, as we have hereinbefore stated and shown, that by an act of the territorial legislature, passed in 1858, the act of 1857 was repealed, and these deeds were all executed subsequent to the passage of the act of 1858. At the time, then, of the making of these deeds, the law of 1857 had no further existence. The date of the entry of the land does not appear in the record. The date of

the patent is April 1, 1859, so we cannot say whether the entry was made during the life of the act of 1857, or after the enactment of the law of 1858 on the subject; but however this may have been, at the date of the conveyances in question the act of 1858 was in force and the law of 1857 did not exist, had been repealed, and the recital in the deeds referring to the act of 1857 as the basis or source of authority for their execution had no other or greater force or effect than if there had been no recital, no reference to any law as authorizing the performance of the act of making the deeds. If there had been no recital of the authority it would not have invalidated the deeds. (*Burbank v. Ellis*, 7 Neb., 156.) The deeds must be viewed as executed under the authority and provisions of the act of 1858.

It is insisted that it should have been shown that the city of Grandview had been incorporated and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them, or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones; that all the acts to be performed had been done or the facts required to exist by the statute were existent at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust and upon whom it devolved as a duty, on demand by the proper party, to make a deed,—in this case the chairman of the board of trustees of the city,—and his settlement of the questions was not subject to collateral attack. As was said in the decision of the case of *Taylor v. Winona & St. P. R. Co.*, 47 N. W. Rep. [Minn.], 453,

“The execution of a deed of a part of the town site by the judge, who is trustee for that purpose, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,—that the judge did his duty in all respects and had required the grantee to show by legal proofs that he was the party entitled to a deed and that he had complied with all the necessary prerequisites to its execution. Moreover, when a trustee in whom is vested the land constituting a town site, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust, but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. (*Anderson v. Bartels*, 7 Colo., 256; *Murray v. Hobson*, 10 Colo., 66; *Chever v. Horner*, 11 Colo., 68; *Mathews v. Buckingham*, 22 Kan., 166; *Ming v. Foote*, 23 Pac. Rep. [Mon.], 515; *Whittlesey v. Hoppenyan*, 72 Wis., 140; *Smelting Co. v. Kemp*, 104 U. S., 640; *Cofield v. McClelland*, 16 Wall. [U. S.], 331.” *Tucker v. Chicago, St. P., M. & O. R. Co.*,

65 N. W. Rep. [Wis.], 515; *Lamm v. Chicago, St. P., M. & O. R. Co.*, 47 N. W. Rep. [Minn.], 455.) Nor was it necessary to prove the organization of the city in order to make the deeds properly receivable in evidence. (*Mathews v. Buckingham*, 22 Kan., 166.)

It is contended that it was necessary for the parties depending on the deeds from the trustees of the city as evidence of title, to show that A. B. Moore who signed the conveyance was chairman of the board of trustees, before they should have been received in evidence, or at least before instructing the jury that they were competent evidence and established one link in the chain of title. This was not one of the facts, the existence of which as a prerequisite to the execution of the transfer, he determined before making the conveyances. We have herein quoted portions of one of the deeds, and it was agreed that in such statement as we have copied they were all similar; and it will be remembered that it was not recited in the deed that A. B. Moore was chairman of the board of trustees, and he signed it "A. B. Moore, chairman," with no statement indicating of what body or organization he was chairman, and no reference to the board of trustees of the city of Grandview, unless it should be said that the deed, being one which, according to its recitals, was made by such trustees, and he signing it as "chairman," it must be presumed to be as such officer of the board stated in the deed. Had the recital of the capacity in which he executed the deeds appeared therein, or after his signature, it would have proved no more, as against plaintiff in error, than that he claimed to have executed them as such officer. It would not have been proof of the

fact that he was such chairman. The acknowledgment identified Moore as chairman of the board of trustees of Grandview city, but this was but for the purposes of the acknowledgment, which was no part of the deed, and was not substantive proof of the fact as an independent fact. During the trial there was introduced in evidence, over the objection of the plaintiff in error, "Page 14, Book of Corporation of Grandview," which, from its statements, would seem to be the minutes of the proceedings at a meeting of the board of trustees of the city of Grandview, and that among other things which transpired at the meeting of date August 4, 1858, A. B. Moore was appointed chairman. This was identified by but one witness, who was asked: "Q. You remember an organization known as the Grandview Company?" to which he answered: "A. Yes, sir," and his examination was continued in part as follows: "Q. Were you a member of it? A. I was." He was shown a book and stated: "That is the minutes or records of the meetings and transactions of the company—of the board of trustees;" and again, in answer to a question propounded by counsel for plaintiff in error, he answered: "I know that it is the book of the records of the transactions of the company;" and again: "Why, it is the records of the proceedings of the company—the Grandview Company—kept by the secretary or secretaries of that company." From which it will be gathered that the page of the book introduced in evidence was not identified as being the minutes of a meeting of the board of trustees of the city of Grandview, but of the "Grandview Company," and was not competent as evidence of the proceedings of the board of trustees of the city of Grandview. This witness also testified that he was a

member of the Grandview Company, and at one time its secretary; he thought its last one; that he knew who was chairman of the board of trustees of the company; that it was A. B. Moore and that there was never any other. Proof that A. B. Moore was chairman of the board of trustees of an organization called the Grandview Company had no relevancy or competency in this case. Unless he was chairman of the board of trustees of Grandview city he had no power or authority to act and execute the deeds transferring the title, held in trust by the board, to the beneficiaries of the trust, and without proof that he was such chairman the deeds were not evidence of the conveyance of the title. There being no proof of the fact of his chairmanship of the board of trustees of the city of Grandview, the court erred in instructing the jury that the defendants in error had shown a complete title, as these deeds signed by "A. B. Moore, chairman," constituted an indispensable link in the chain of each title to be proved.

On the facts or circumstances involved in the second, or affirmative defense, viz., adverse possession for a sufficient length of time to bar any action for recovery of the possession or title of the premises, we will not now comment. As there must be a new trial and they must again be submitted to the jury or a trial judge for determination, a discussion of them at this time is unnecessary and might be prejudicial to the rights of one or the other of the parties in another trial. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

IRVINE, C., took no part in the decision.

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Accord and Satisfaction.

1. The rule that where a certain sum is due from one to another, the payment of a lesser sum is not a discharge as to the remainder, though the parties agree that the payment is made in discharge of the entire debt, does not apply to an unliquidated claim, or to a *bona fide* dispute as to the amount due. *Treat v. Price* 875
2. One receipting in full for payment tendered upon condition of its acceptance in satisfaction of the amount in dispute, cannot recover the balance claimed by him, though he protested that the sum paid was less than the amount due. *Id.* 876

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Acknowledgment.

The first paragraph of the syllabus in *Hoadley v. Stephens*, 4 Neb., 431, is overruled to the extent in which it relates to the acknowledgment of deeds in another state than this, before a commissioner of deeds for this state. *Omaha Real Estate & Trust Co. v. Kragsscoie* 594

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2. Where the surety on an appeal bond undertakes to pay any judgment rendered against appellants, he is liable, though the appellate court renders judgment against only one of them. *Id.*
3. The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain a suit against the surety on an appeal bond. *Id.*
4. Upon appeal from a justice of the peace to the district court, the latter may, upon motion of appellee, order appellant to furnish a sufficient appeal bond within a certain time, and dismiss the appeal for non-compliance with the order. *Gallagher v. Wolf*.. 589

Appearance. See ATTORNEY AND CLIENT, 4. COURTS, 1.
SUMMONS, 3.

Arbitration.

Validity of award fixing the amount to be paid to a lessee for improvements as a condition of lessor's right to terminate the lease. *Estabrook v. Sterenson*, 206

Assault.

Evidence held sufficient to sustain a conviction. *Wells v. State* 74

Assignments. See MORTGAGES, 1.

An assignment by contractors for a county building,

Assignments—concluded.

of all their interests in warrants or vouchers due them from the county, was *held* not to include money subsequently earned by them under their contract.

Ryan v. Douglas County..... 10

Assumpsit. See ATTORNEY AND CLIENT, 4.

Attachment. See DAMAGES, 3. GARNISHMENT.

1. An affidavit setting forth the grounds for attachment in the language of the statute is sufficient.

Burnham v. Range..... 175

2. Rights of attaching creditors as against creditors claiming under chattel mortgages. *Commercial Nat.*

Bank v. Merchants Exchange Nat. Bank..... 217

Attorney and Client.

1. Five thousand dollars was *held* to be a reasonable attorney's fee under the facts stated in the opinion.

Ryan v. Douglas County..... 19

2. An attorney's fee cannot be taxed under sec. 22, ch. 50, Comp. Stats., in a case prosecuted by the county attorney. *Hornberger v. State*..... 41

3. An attorney employed to collect a debt cannot, without further authority, release the debtor, except upon payment of the money in full. *Smith v. Jones*, 108

4. In a suit against attorneys for moneys collected, a recovery for damages resulting from their unauthorized appearance in an action independent of the collection cannot be sustained. *Scott v. Kirschbaum*, 331

Attorneys.

The rule that physicians must possess and exercise an ordinary degree of skill in practicing their profession applies to attorneys. *Griswold v. Hutchinson*.. 734

Banks and Banking. See STATE TREASURERS.

Liability of bank in discounting drafts for the value of stock shipped to commission merchants. *Burke*

v. Utah Nat. Bank..... 247

Bastardy.

1. Evidence of complainant's unchastity outside the period of gestation is irrelevant. *Davison v. Cruse*, 829

2. The probable duration of the period of gestation is a question of fact to be shown by proper evidence in each case where the question is material. *Id.*

3. A mere preponderance of the evidence is sufficient to sustain a verdict of guilty. *Id.*

Bill of Exceptions. See REVIEW, 18-23.

1. A bill of exceptions not authenticated by the clerk of the district court will be disregarded in the supreme court. *Felber v. Gooding*..... 38
Childerson v. Childerson..... 162
First Nat. Bank of Greenwood v. Cass County..... 172
Romberg v. Fokken..... 198
Union P. R. Co. v. Kinney..... 393
Wood v. Gerhold..... 397
2. A bill of exceptions not authenticated according to statute will be disregarded upon review. *Andres v. Kridler* 585
3. A bill of exceptions will not be considered in the supreme court unless certified to be the original or a copy. *Sieberling v. Fletcher*..... 847
4. Where a new trial has been granted, the time to prepare a bill of exceptions preserving the evidence on the first trial is fixed at the latest by the term at which the motion for a new trial was sustained. *State v. Ambrose*..... 235
5. A bill of exceptions lawfully settled and allowed is a necessary part of a record for the consideration of assignments in relation to errors occurring at the trial in the lower court. *Oltmanns v. Findlay*..... 289
6. Where documents have been omitted from a bill of exceptions through the fault of defendant in error, plaintiff in error may be permitted to withdraw it from the supreme court for the purpose of presenting to the trial judge an application for amendment. *Macfarland v. West Side Improvement Ass'n*..... 662

Bills and Notes. See NEGOTIABLE INSTRUMENTS. STATE TREASURERS, 7.**Bills of Lading.** See CARRIERS, 4, 5.**Bonds.** See INDEMNITY BONDS. RES JUDICATA, 2.

1. The state is not entitled to concurrent remedies upon the bonds of successive officers to enforce the same liability. *State v. Hill*..... 459
2. An averment by a surety that if the bond was ever delivered, it was in violation of an agreement that he signed upon condition the principal should also sign, was held to be an admission of delivery. *Id.*.. 456
3. Where an officer writes his name in the body of his official bond and subscribes his oath of office indorsed thereon, the bond is valid and binding after

Bonds—concluded.

delivery, acceptance, and approval, though he inadvertently omitted to attach his final signature. *Id.*, 457

4. Petition held to state a cause of action in a suit on a bond for the performance of a contract requiring a builder to pay the laborers and material-men. *Fitzgerald v. McClay*..... 816

Building Contracts. See ASSIGNMENTS.

Burden of Proof. See MASTER AND SERVANT, 3.

Burglary.

Evidence held sufficient to sustain a conviction. *Bush v. State* 642

Canal Companies. See STATUTES, 1, 2.

Carriers. See RAILROAD COMPANIES.

1. A shipper who cares for his cattle in transit and travels on a drover's pass is not, while accompanying his stock, entitled to all the rights and privileges of ordinary passengers. *Omaha & R. V. R. Co. v. Crow* 84
2. A shipper who cares for his cattle in transit and travels on a drover's pass does so under the implied condition that he will submit to whatever inconveniences are necessarily incident to his undertaking. *Id.*
3. The question as to negligence and contributory negligence is for the jury in an action against a carrier for the death of a shipper who traveled on a drover's pass and accompanied and cared for his cattle on the way. *Id.*..... 85
4. A carrier delivering property to any one except the owner and holder of the bill of lading is liable for resulting loss. *Union Stock Yards Co. v. Westcott*... 300
5. Directions in a bill of lading to notify a certain person of the arrival of the goods do not authorize the carrier to deliver the consignment to such person without the production of the bill of lading. *Id.*

Chattel Mortgages. See PARTNERSHIP, 3, 4. SALES, 5.

1. In a suit by a creditor to subject to the payment of his claim the debtor's goods in possession of agents of other creditors, plaintiff did not disclose a right superior to that of defendants' by merely showing that they took possession of the goods and were disposing of them under defective chattel mort-

Chattel Mortgages—concluded.

- gages. *Commercial Nat. Bank v. Merchants Exchange Nat. Bank* 217
2. The title to mortgaged chattels remains in the mortgagor until divested by foreclosure. *Murray v. Loushman* 256
Strahle v. First Nat. Bank of Stanton..... 321
3. A mortgagee's right to the use of the chattels, in the absence of a special agreement, is merely an incident to foreclosure proceedings. *Murray v. Loushman* 256
4. A mortgagee who takes possession of the chattels and retains them an unreasonable time before foreclosing his lien is liable to the mortgagee for their use. *Id.*
5. A mortgagee who fails to comply with the statutory requirements relating to foreclosure is liable to the mortgagor for the value of the property, less the mortgage lien. *Callen v. Rose*..... 638
6. One who accepted from a joint owner a chattel mortgage upon a threshing-machine incumbered by an unrecorded purchase-money mortgage of which the former had no knowledge, held a mortgagee in good faith within the meaning of sec. 14, ch. 32, Comp. Stats. *State Bank of Lushton v. Kelley*..... 678
7. A mortgagee in good faith within the meaning of sec. 14, ch. 32, Comp. Stats., is one who takes a mortgage to secure a debt without notice of other existing claims against the mortgaged property. *Id.*

Clerk of District Court.

Where the instructions of the court are attacked as erroneous they should be authenticated by the clerk in his transcript for review. *Burlingim v. Baders*.. 204

Collateral Attack. See CORPORATIONS, 3. PUBLIC LANDS.

Commercial Paper. See STATE TREASURERS, 7.

Commission Merchants. See INDEMNITY BONDS.

Compromise and Settlement. See MORTGAGES, 4. STATE TREASURERS, 6.

1. Unaccepted propositions of compromise are inadmissible in evidence. *Callen v. Rose*..... 638
2. A debtor receipting for money tendered upon condition of its acceptance in satisfaction of the amount in dispute, though protesting that more is

Compromise and Settlement—concluded.

- due, accepts the condition, and cannot recover the balance claimed. *Treat v. Price*..... 876
3. The fact that the sum paid in satisfaction of a disputed claim is only the amount the debtor concedes to be due, does not invalidate the settlement. *Id.*
 4. Avoiding delay, litigation, and expense of an accounting may constitute a consideration for a settlement by the payment and receipt of the sum the debtor admits to be due. *Id.*
 5. The terms of a receipt for money tendered upon condition of its acceptance in satisfaction of the amount in dispute, and the refusal of payor's agent to pay the money before the signing of the receipt, held notice to the creditor that the agent had no authority to make payment except upon the condition of the tender. *Id.*

Consideration. See COMPROMISE AND SETTLEMENT, 4.
CONTRACTS, 4-6.

Constitutional Law.

Extradition.

1. It is not a violation of the federal constitution to prosecute a fugitive for an extraditable offense other than that for which he was extradited from another state, without first giving him an opportunity to return thereto. *State v. Leidigh*..... 126

Titles of Bills.

2. The canal act (Session Laws, 1895, ch. 71) is unconstitutional, the subject not being clearly expressed in the title. *State v. County Commissioners of Douglas County* 429

Police Powers.

3. The legislative power to subserve the public welfare by regulations in the interest of health and safety is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise. *Chicago, B. & Q. R. Co. v. State*..... 550
4. The power to subserve the public welfare by regulations in the interest of health and safety may be asserted directly by the legislature or delegated to municipal corporations or other agencies. *Id.*
5. The essential quality of police power as a governmental agency is that it imposes upon persons and

Constitutional Law—concluded.

- property burdens designed to promote the safety and welfare of the public at large. *Id.*..... 549
6. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. *Id.*
7. "Due process of law" does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to established practice in courts. *Id.*..... 550
8. "Due process of law" is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the object sought to be attained. *Id.*
9. Courts should not interfere to prevent the enforcement of statutes on account of a mere difference of opinion between them and the legislature respecting the wisdom or necessity of particular measures. *Id.*
10. Section 48, ch. 12*a*, Comp. Stats., authorizing the city of Omaha to require, by ordinance, railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, is a valid exercise of police power. *Id.*
11. An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha *held* not to violate prior contract obligations. *Id.*

Jurisdiction of Supreme Court.

12. It is not within the power of the legislature to confer upon the supreme court original jurisdiction over subjects not enumerated in the constitution. *State v. Hall.*..... 579

Contempt.

1. County officers may be punished for refusing to obey a *mandamus* ordering them to pay a judgment, though the judgment is void. *Boasen v. State*, 245
2. To constitute a publication contemptuous, it must reflect upon the conduct of the court in reference to a pending case, and tend to influence the decision, or obstruct, interrupt, or embarrass the administration of justice. *Rosewater v. State.*..... 630

Contempt—concluded.

3. Where a newspaper article is susceptible of an innocent construction, requires an innuendo to apply its meaning to the court, and the language is not shown to have been employed in a culpable sense, the publisher is not liable for contempt. *Id.*

Contracts. See CONSTITUTIONAL LAW, 3. PRINCIPAL AND SURETY, 2, 4.

1. The term "due" does not include contingent liabilities which may ripen into absolute indebtedness upon the future performance of contract obligations. *Ryan v. Douglas County*..... 9
2. A contract cannot be rescinded in part on account of fraud, and ratified in part. *Baum Iron Co. v. Burg*, 21
3. Defendants held not liable on a conditional agreement to pay plaintiff a certain sum upon completion of a contract with others. *Barsby v. Warren*..... 275
4. A contract to employ one so long as the employer's works are kept running, or until the employe shall see fit to quit, in consideration of the release of the latter's claim for damages, is not void for uncertainty, for want of mutuality, or as being within the statute of frauds. *Carter White Lead Co. v. Kinlin* 409
5. To sustain a contract having for a consideration the release of a claim for damages against the promisor it is not necessary that the claim should be one which, on litigation, would prove valid. *Id.*.... 410
6. Where the consideration is sufficient, one party to a contract may obligate himself for a definite or indefinite period, and the other party may at the same time have the option of terminating it at will. *Id.*
7. Agreement held to be one by which a judgment creditor bound himself to exhaust the property of one judgment debtor before proceeding against that of another. *Gibson v. McClay*..... 900

Conversion. See PARTIES, 3. SET-OFF AND COUNTER-CLAIM.

Conveyances. See DEEDS.

Corporations.

1. The attempt in chapter 71, Session Laws, 1895, to make a canal company a corporation was nugatory, being an attempt to amend the general corporation

Corporations—concluded.

- law without a reference to its provisions in the amendatory act. *State v. County Commissioners of Douglas County* 428
2. Rights of action under sec. 139, ch. 16, Comp. Stats., abated with the repeal of said section without a saving clause. *Hogue v. Capital Nat. Bank*..... 929
3. Persons contracting with a *de facto* corporation relying upon its corporate credit, where it has been in existence for a considerable time, cannot assail its corporate character collaterally in order to hold its stockholders liable for its failure to become a *de jure* corporation. *Id.*

Costs.

1. An attorney's fee cannot be taxed against defendant under sec. 22, ch. 50, Comp. Stats., in a case prosecuted by the county attorney. *Hornberger v. State*.. 40
2. Money paid into court for a party cannot be applied to the payment of the fees of the sheriff for serving process for the other party. *Van Etten v Coburn*... 283
3. A judgment for costs is not one from which appeal or error will lie. *Barnhouse v. Village of Adams*.... 761
4. A mere judgment for costs of suit is not a final order. *Little v. Gamble*..... 828

Counties. See ASSIGNMENTS. CORPORATIONS, 1. HIGHWAYS.

1. Abortive ballots should not be counted for the purpose of making up the grand total of the votes cast at an election on a proposition to relocate a county seat. *State v. Roper*..... 417
2. More than three-fifths of the number of valid ballots upon a proposition to relocate the county seat of Red Willow county having been in favor of McCook, that city became the county seat. *Id.*

County Court.

- A county court has power to remove a guardian, upon notice, when he has become unsuitable or incapable of discharging his trust. *Crooker v. Smith*..... 102

County Seat. See COUNTIES.**County Treasurers. See OFFICE AND OFFICER, 1.****Courts. See CONSTITUTIONAL LAW, 9.**

1. A stipulation transferring a case was held equivalent to a dismissal in the county court and a recom-

Courts—concluded.

mencement conferring jurisdiction upon the district court wherein the pleadings were refiled, though the county court had no jurisdiction. *Lundgren v. Crum* 242

2. The original jurisdiction of the supreme court is restricted to cases relating to the revenue, civil cases to which the state is a party, *mandamus*, *quo warranto*, and *habeas corpus*. *State v. Hall*..... 579

Creditors' Bill. See ESTOPPEL, 1. PARTNERSHIP, 3, 4.

Criminal Law. See INSTRUCTIONS, 14-18.

1. Harmless error in an instruction is not ground for reversal. *Hornberger v. State*..... 40
2. Where the evidence will warrant a conviction it is not error to refuse to direct a verdict for defendant. *Id.*
3. Where the only error in a record for review relates to the entry of the final order, the cause may be remanded with directions to the court below to enter a proper judgment on the verdict. *Id.*
4. Assignments of error based upon the existence of facts in respect to which there is no evidence in the record will be disregarded in the supreme court. *McCall v. State*..... 660

Custom and Usage.

Proof of knowledge is required to give effect to a custom not widely and generally known. *Union Stock Yards Co. v. Westcott*..... 300

Damages. See ATTORNEY AND CLIENT, 4. CHATTEL MORTGAGES, 4. DEATH BY WRONGFUL ACT. LIBEL AND SLANDER. MUNICIPAL CORPORATIONS, 2, 3, 14. NEGLIGENCE. RAILROAD COMPANIES, 4-6. REPLEVIN, 5. TRESPASS.

1. Verdict for \$2,374.50 *held* supported by sufficient evidence in an action against a city for damages resulting to plaintiff's property by construction of a viaduct. *City of Omaha v. McGavock*..... 313
2. Verdict for plaintiff in a suit for damages against a chattel mortgagee who failed to comply with the statute relating to foreclosure, *held* not excessive. *Callen v. Rose*..... 638
3. Evidence *held* insufficient to support a judgment for defendant in an action against a sheriff for the

Damages—concluded.

value of property wrongfully attached and sold.

Kinsella v. Sharp..... 664

4. Liability of owner of dangerous building for injuries resulting from a falling wall. *Kitchen v. Carter*, 776

5. The value of goods converted is the only issue available in a suit against a sheriff for making a sale without an appraisement after the debtor lawfully claimed his exemptions. *Daley v. Peters*..... 849

Death by Wrongful Act. See CARRIERS, 3. NEGLIGENCE, 4.

Verdict for plaintiff for \$2,400 sustained where the person killed was a boy of seventeen, a competent compositor, able to earn \$4 a day, and his next of kin, his father, forty-six years old, a poor man with four children. *Post v. Olmsted*..... 893

Decrees. See JUDGMENTS.**Deeds.** See ACKNOWLEDGMENT. PLEADING, 3.

1. Sufficiency of consideration for a deed from mother to son. *Issitt v. Dewey*..... 196

2. The delivery is sufficient where a mother executes a deed to her son and places it on record with intent to pass title. *Id.*

3. The delivery of a deed is essential to render the conveyance operative. *Brown v. Westerfield*..... 399

4. Delivery is a question of intent to be determined by the facts and circumstances of each particular case. *Id.*

5. The loss or destruction of a deed after delivery does not divest the title of the grantee. *Id.*

6. Delivery to the grantee personally is not essential to the validity of a deed. *Id.*

7. Delivery is sufficient where the grantor delivers the deed to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. *Id.*

8. Under the facts stated in opinion, delivery to a justice of the peace of a deed from a mother to her minor daughter held sufficient to pass title. *Id.*

9. A conveyance of Joel S. Smith's title was not shown by a deed of John S. Smith. *Omaha Real Estate & Trust Co. v. Kragscow*..... 592

10. A deed absolute in form passes the legal title,

Deeds—concluded.

- though intended as security for a debt. *Stall v. Jones* 706
- 11. A correct designation of the statute under which a deed was executed *held* not essential to the validity of the deed. *Green v. Barker*..... 935

Delivery. See DEEDS.

Depositories. See NOVATION.

Descent and Distribution.

- 1. Inheritance *per stirpes* does not obtain except where affirmatively provided. *Douglas v. Cameron*..... 358
- 2. It is the object of the statute to cut off inheritance *per stirpes* among collaterals, where, at any point beyond the children of brothers and sisters, the surviving kindred are of unequal degrees, and in such case those nearest in degree take the estate to the exclusion of those more remote. *Id.*
- 3. The rule of inheritance *per stirpes* is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate, and where they are of equal degree, they take as principals. *Id.*
- 4. Where an intestate left neither issue, father, mother, brother, nor sister, the surviving nephews and nieces took, under sec. 30, ch. 23, Comp. Stats., the intestate's land *per capita*, and the grand-nephews and grand-nieces took nothing. *Id.*

Disclaimer. See GARNISHMENT, 1.

Dismissal. See APPEAL BONDS, 4. REPLEVIN, 4. REVIEW, 7.
Plaintiff may, as a matter of right, under sec. 430 of the Code, dismiss his action without prejudice any time before final submission of the cause to the court or jury. *Sharpless v. Giffen*..... 146

Divorce.

- 1. Where plaintiff's uncontradicted testimony is weak and open to suspicion, the trial judge is not bound to accept it as conclusive, though corroborated in some minor details. *Cummins v. Cummins*..... 872
- 2. Before granting a divorce the trial judge must be satisfied that the suit is prosecuted in good faith and without collusion, and that a cause of action exists, though defendant does not appear. *Id.*

Documents. See EVIDENCE, 5.

Easements. See RAILROAD COMPANIES, 3, 4.

Ejectment. See EVIDENCE, 10, 11.

1. Plaintiff must possess and prove a legal title.
Omaha Real Estate & Trust Co. v. Kragcow..... 592
2. Plaintiff must recover upon the strength of his own title and cannot rely upon the weakness of defendant's. *Id.*

Election of Remedies. See BONDS, 1. REVIEW, 4. SALES, 3.

Elections. See COUNTIES.

Embezzlement.

1. It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled. *State v. Hill*..... 458
2. The word "loan," as used in sec. 124, Criminal Code, 1873, has no application to bank deposits for the safe-keeping of public funds. *Id.*
3. Sec. 124, Criminal Code, 1873, defining embezzlement of public funds and relating to the loaning thereof, was not intended as an amendment of existing statutes regulating the means of preserving and accounting for public funds. *Id.*

Eminent Domain. See HIGHWAYS. RAILROAD COMPANIES, 3, 4.

Equity. See JUDGMENTS, 17. VENDOR AND VENDEE, 2, 3.

Error. See REVIEW.

Error Proceedings. See REVIEW.

Estoppel. See SET-OFF AND COUNTER-CLAIM.

1. A creditor who subjected a portion of mortgaged land to the payment of his judgment, and afterward bought the mortgage, is not estopped by the creditors' bill and the proceedings thereunder from foreclosing as to the unsold land. *Hall v. Hooper*..... 112
2. A creditor who signed a stipulation authorizing the agent of a rival creditor to sell the debtor's goods and remit the proceeds to the principal, in the absence of fraud, was estopped from asserting a superior right to the proceeds of the sale. *Commercial Nat. Bank v. Merchants Exchange Nat. Bank*..... 217
3. To constitute an estoppel *in pais* the person sought to be estopped must have conducted himself with

Estoppel—concluded.

the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give. *Burke v. Utah Nat. Bank* 247

4. Commission merchants who obligated themselves by a letter of credit to pay to a bank drafts for the cost or value of stock shipped to them were not estopped, in an action based on their refusal to accept a draft, from proving that they applied to an earlier draft a later shipment made the day the earlier draft was accepted. *Id.*
5. A judgment debtor, protected by an agreement under which his property is to be kept free from levy until that of another has been exhausted, held not estopped by his acts or statements from asserting his rights under the agreement. *Gibson v. McOlay*.. 901

Evidence. See BASTARDY. CUSTOM AND USAGE. INSURANCE, 5, 15. JUDGMENTS, 13, 14. MUNICIPAL CORPORATIONS, 4. NEGOTIABLE INSTRUMENTS, 3-5. PRINCIPAL AND AGENT, 3, 4. SALES, 2. TAX DEEDS. TRIAL, 1.

Judicial Notice.

1. Courts will take judicial notice of the incorporation of a village by a special legislative act, where the legislature has, in the act, declared it to be a public law. *Hornberger v. State*..... 40

Records.

2. The non-existence of a record may be proved by the testimony of one who is cognizant of the fact. *Id.*
3. The existence of a record may be proved by its production or by an authenticated copy. *Id.*

Papers. Copies.

4. Where primary evidence has been lost secondary evidence may be introduced. *Regier v. Shreck*..... 667
5. Original papers and records should not be introduced in evidence instead of copies. *Id.*
6. Where the papers in an attachment proceeding have been lost, their contents may be proved by parol, the proper foundation having been laid. *Id.*

Alteration of Note.

7. Where it is apparent from an inspection of a promissory note sued on that it has been materially

Evidence—concluded.

altered, it may generally be received in evidence.

Goodin v. Plugge..... 284

Judgments.

8. Pleadings and judgment in an action against a sheriff for a wrongful seizure of property, *held* admissible in an action on his bond for the judgment, though it was rendered jointly against him and another. *Lewis v. Mills*..... 911

Names. Deeds.

9. A conveyance of Joel S. Smith's title was not proved by a deed of John S. Smith. *Omaha Real Estate & Trust Co. v. Kragson*..... 592

Minutes of Meetings.

10. Minutes of the meetings of the "Grandview Company" *held* not evidence of the proceedings of the board of trustees of the "City of Grandview." *Green v. Barker* 935

Deeds.

11. Conveyances by the trustees of a city cannot be shown by deeds executed by one as "chairman" without proof that he was chairman of the board of trustees. *Id.*

Rulings.

12. Error cannot be predicated on the admission of evidence, where ample evidence of the same nature was admitted without objection. *Hickman v. Layne*, 178
13. Unaccepted propositions of compromise are inadmissible. *Callen v. Rose*..... 638

Weight.

14. A preponderance of the evidence is sufficient to establish an issue in any civil action. *Stall v. Jones*.. 706

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 9, 17.

Executions. See EXEMPTIONS. JUDGMENTS, 17. RES JUDICATA, 2.

Affirmative relief from a judicial sale and conveyance under a void decree will not be granted in favor of one who fails to show an equitable interest in the land sold. *Hall v. Hooper*..... 111

Exemption.

An officer holding a levy is liable for conversion where he sells the property without an appraisal after the debtor claims his exemption and

Exemption—concluded.

files an inventory under sec. 522, Code. *Daley v. Peters* 848

Extradition.

A fugitive may be prosecuted for an extraditable offense other than that for which he was extradited from another state, without having had an opportunity to return thereto. *State v. Leidigh*..... 126

False Representations. See INSURANCE, 3, 5. VENDOR AND VENDEE, 2, 3.

Final Order. See REVIEW, 36-40.

Findings. See REVIEW, 2.

Foreclosure. See MORTGAGES.

Fraud.

In pleading fraud it is necessary to set out the facts relied upon for relief. *Crosby v. Ritchey*..... 924

Fraudulent Conveyances.

Certain instructions set out in opinion and approved. *Regier v. Shreck*..... 671

Garnishment.

1. A judgment debtor disclaiming any interest in the money garnished cannot predicate error upon an order requiring the garnishee to pay the money into court, or upon the refusal to vacate such order. *Burnham v. Range*..... 175
2. Garnishees who paid into court a sum due from them to an attachment defendant are not liable to pay it again at the suit of the attachment debtor, though the payment was made before jurisdiction had been acquired of the person to whom the debt was originally due from them. *Scott v. Kirschbaum*, 332

Gifts.

Except as against creditors, one may give away his property. *Kinsella v. Sharp*..... 664

Guaranty.

Construction of letter of credit providing for payment of drafts, until further notice, for the cost or value of stock shipped with or without bill of lading attached. *Burke v. Utah Nat. Bank*..... 247

Guardian and Ward.

1. The disability justifying the removal of a guardian

Guardian and Ward—concluded.

need not be one arising after the appointment.

Crooker v. Smith..... 102

2. Corruption or malfeasance is not necessary to authorize the removal of a guardian. *Id.*
3. A guardian may be removed whenever found unsuitable. *Id.*
4. Evidence of a failure to properly protect the rights of the ward is sufficient proof of the guardian's unsuitability. *Id.*
5. The word "unsuitable" in sec. 28, ch. 34, Comp. Stats., applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests. *Id.*

Habeas Corpus.

Habeas corpus is never allowed as a substitute for appeal or writ of error. *State v. Leidigh*..... 126

Highways.

1. The county board may, in one proceeding, open connecting roads on different section-lines. *Barry v Deloughrey* 354
2. In opening a section-line road a finding that the public good requires it need not be made of record by the county board. *Id.*
3. No petition is necessary to confer power upon a county board to open a section-line road. *Id.*
4. Before a section-line road can be opened there must be proceedings, upon proper notice, to ascertain damages. *Id.*

Husband and Wife. See PRINCIPAL AND AGENT, 2.

Indemnity. See PRINCIPAL AND SURETY, 4.

Indemnity Bonds.

Petition *held* to state a cause of action against the sureties on an indemnity bond given to a stock yards company to secure it against any act or negligence of certain commission merchants. *Union Stock Yards Co. v. Westcott*..... 301

Indictment and Information.

Sufficiency of information charging that accused kept intoxicating liquor for sale without a license. *Hornberger v. State*..... 40

Inheritance. See DESCENT AND DISTRIBUTION.

Injunction. See JUDGMENTS, 9. TAX DEEDS.

Injunction is the proper remedy to prevent the violation of an agreement by which a judgment creditor bound himself to exhaust the property of one defendant before proceeding against that of another.

Gibson v. McClay..... 901

Insolvency. See PARTNERSHIP.

Instructions.

Numbers.

1. The failure to number instructions is not reviewable in absence of an exception on that ground.
Herzog v. Campbell..... 370

Citations.

2. Citations should not be noted on instructions, but prejudice will not be presumed from such references. *Id.*

Requests.

3. A party who neglects to request proper instructions cannot have reviewed the failure of the court to charge the jury upon particular issues or evidence. *Carter White Lead Co. v. Kinlin*..... 409

Evidence.

4. It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence. *Murphey v. Virgin*, 693
5. Where pleadings contain matters of evidence rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded and disregarding the evidentiary facts. *Id.*

Repetitions.

6. An instruction like one already given may be refused. *Beavers v. Missouri P. R. Co*..... 761

Harmless Error.

7. Harmless error in an instruction is not a ground for reversal. *Id.*..... 762
Burlington & M. R. R. Co. v. Gorsuch..... 767

Issues.

8. It is error to submit to the jury an issue of negligence not raised by the pleadings. *Omaha & R. V. R. Co. v. Wright*..... 886

Exceptions.

9. A general exception to instructions is not sufficient.
City of Omaha v. McGarock..... 313
10. Where the instructions were not excepted to, they

Instructions—concluded.

will not be reviewed in the supreme court. <i>Romberg v. Hediger</i>	201
<i>City of Omaha v. McGarock</i>	313

Assignments of Error.

11. Rulings in giving or refusing instructions should not be reviewed when insufficiently assigned for error in the motion for a new trial. <i>Hickman v. Layne</i>	177
12. Assignments of error relating solely to the intelligibility of an instruction do not raise a question as to the correctness of a proposition properly stated in the instruction. <i>Romberg v. Hediger</i>	203
13. Where one of the instructions is correct, the other instructions cannot be reviewed upon an assignment of error attacking the entire charge of the court. <i>First Nat. Bank of Wilber v. Ridpath</i>	99
<i>Romberg v. Hediger</i>	201
<i>Oltmanns v. Findlay</i>	289

Criminal Law.

14. In criminal cases it is the duty of the court to present the issues to the jury whether requested or not, and a charge which, by the omission of certain elements, has the effect of withdrawing from the jury an essential issue is erroneous, but is not cause for reversal unless prejudicial to accused. <i>Pjarrou v. State</i>	294
15. It is not prejudicial error to refuse an instruction inapplicable to the evidence, though it contains correct abstract propositions of law. <i>Wells v. State</i> , 74	
16. An assignment that an instruction in a criminal case was not sufficiently explicit may be overruled in the appellate court where accused failed to request an instruction more explicit than that given. <i>Pjarrou v. State</i>	295
17. Instructions will not be reviewed unless the record shows they were excepted to when given. <i>Bush v. State</i>	642
18. It is not error to refuse instructions containing statements already given. <i>Id.</i>	

Insurance. See PRINCIPAL AND SURETY, 4.**Ownership.**

1. The question as to whether the insured at the date of the issuance of the policy was the owner of the

Insurance—continued.

insured property is for the jury, where that question is in issue. *Oakland Home Ins. Co. v. Bank of Commerce* 717

Rights of Mortgagee.

2. Case where mortgagee's right to recover on a policy under a clause making the loss payable to him as his interest should appear was sustained, though the mortgagor transferred the insured property in violation of the policy. *Id.* 718
3. Where a loss under a mortgagor's policy is payable to the mortgagee, the right of the latter to maintain an action for the insurance money is not necessarily defeated by such misrepresentations in the application as would prevent a recovery in a suit by the insured on his own behalf. *State Ins. Co. v. New Hampshire Trust Co.* 62

Misrepresentations.

4. A representation by an applicant that no other insurance existed, should not be deemed false in such a sense as to invalidate his policy merely because a former owner of the property procured insurance in his own favor after parting with his title. *Id.*
5. Where the application and the policy bear the same date, it will not be inferred, in absence of evidence, that the officers of the company, at its home office in another state, were influenced to approve the risk by misrepresentations in the application. *Id.*

Letters.

6. Effect of a statement by the secretary of a company, in returning proof of loss, that the insurer "neither admits nor denies its liability nor waives any of its rights" under the policy. *Home Fire Ins. Co. v. Kennedy* 138

Arbitration.

7. Arbitration clause in a policy held revocable by either party, and not to oust the courts of jurisdiction. *Id.*
8. A company by denying liability on the ground of forfeiture through insured's breach of warranty, waives its right to insist upon arbitration as a means of determining the amount of insured's damage by fire. *Id.*
9. Where an insurer, with knowledge of a breach of warranty by insured, fails to declare a forfeiture of

Insurance—concluded.

the policy and continues to recognize its liability by demanding proofs of loss and by insisting upon arbitration, it waives all defenses based upon such breach of warranty. *Id.*

Occupancy.

10. Statement in proof of loss *held* not an admission that the premises were unoccupied within the meaning of the policy so as to invalidate the insurance. *Hanover Fire Ins. Co. v. Parrotte*..... 576

Title.

11. A policy is *prima facie* an admission of insured's title to the property. *Farmers & Merchants Ins. Co. v. Peterson* 747

Incumbrances.

12. It is unnecessary for plaintiff to allege in his petition in an action on a policy that he did not incumber the property. *Id.*
13. Reply *held* to admit that the policy contained a provision for forfeiture of the insurance if the property should be incumbered, but not to admit the signing of the application or the mortgaging of the property. *Id.*

Life Insurance.

14. In a suit on a life insurance policy an insurer alleging that the misrepresentations were contained in the written application cannot prove oral misrepresentations made to the examining physician. *Bankers Life Association v. Lisco*..... 340
15. In a suit on a life insurance policy the beneficiary was permitted to testify that she never knowingly signed an affidavit introduced in evidence to contradict a representation of assured in his application. *Id.*
16. Where an agent is authorized to collect and retain as compensation all admission fees and advanced premiums, he may extend credit therefor without releasing the company from liability, though the application and policy provide that the contract shall not be in force until the fees and premiums are paid, and that the agent has no authority to waive or alter any of the terms of the contract. *Pythian Life Association v. Preston*..... 374

Intoxicating Liquors. See MANDAMUS, 4.

1. The action of an excise board in passing upon an

Intoxicating Liquors—concluded.

- application for a license is judicial. *Waugh v. Graham* 153
- 2. A description in a petition for a license indicating the exact location of the place where the saloon is to be kept is sufficient. *Id.*
- 3. Where objections to the issuance of a license were not presented at the original hearing of the application, they should be disregarded on appeal. *Id.*
- 4. On application for a license, findings of the excise board approved by the district court upon appeal will not be disturbed by the supreme court in an error proceeding, unless the findings are manifestly wrong. *Id.*
- 5. Evidence introduced at the original hearing of an application for a license should be disregarded on appeal unless it was reduced to writing, filed below, and transmitted to the appellate court. *Id.*
- 6. Information framed under sec. 20, ch. 50, Comp. Stats., held to charge a single offense—that accused kept liquor for sale without a license. *Hornberger v. State* 40
- 7. The unlawful intent with which liquors were kept may be presumed from the fact they were sold in violation of law. *Id.*
- 8. After proof of a sale the burden is on accused to show he had a license. *Id.*
- 9. A liquor license cannot be issued lawfully by a city or village until a proper municipal ordinance has been adopted. *Id.*

Journal Entries. See REVIEW, 40.

Judgments. See EXECUTIONS. RES JUDICATA. REVIEW, 2.

Final Orders.

- 1. A finding by a justice of the peace of the amount due plaintiff from defendant is not a judgment. *Denslow v. Dodendorf*..... 328
- 2. An order dissolving a temporary restraining order and denying a temporary injunction is not a final order. *Manning v. Connell*..... 83
- 3. A judgment for costs is not one from which appeal or error will lie. *Barnhouse v. Village of Adams*.... 761
- 4. A mere judgment for costs of suit without a judgment on the verdict is not a final disposition of a case. *Little v. Gamble*..... 828

Judgments—continued.*Summons.*

5. An order setting aside a judgment and quashing the summons before adjournment for the term was approved, where the summons naming February 7 as the answer-day was issued February 6, and served February 13. *Hyde v. Kent*..... 26

Parties.

6. An adjudication affects only those who were parties to the action and their privies. *Monroe v. Hanson*.. 30

Release.

7. Evidence held insufficient to authorize attorneys to make a contract to release a judgment. *Smith v. Jones* 108

Order by Consent.

8. A party cannot predicate error upon an order which he procured to be made. *Norwegian Plow Co. v. Bollman* 186

Injunction.

9. A judgment at law should not be enjoined on the ground of fraud where it does not appear to be inequitable, or where plaintiff in the equity suit did not exercise due diligence in asserting his rights. *Id.*

Validity.

10. The validity of a judgment against a county may be determined on application for a *mandamus* to compel the county officers to pay the judgment. *Boasen v. State*..... 245
11. A judgment foreign to the issues joined and for which there was no prayer should be reversed upon appeal. *Carter v. Gibson*..... 655

Satisfaction.

12. Upon satisfactory proof that a judgment has been fully paid, the court may, on motion, order it discharged and canceled of record. *Manker v. Sine*.... 736

Proceedings to Open Judgment.

13. On motion to open a judgment, under sec. 82, Code, plaintiff may present counter-affidavits to show that defendant had actual notice of the suit in time to make a defense. *Stover v. Hough*..... 789
14. One seeking to open, under sec. 82, Code, a judgment rendered against him upon service by publication must show by a preponderance of the evidence that he had no actual notice of the suit in time to prepare and make a defense. *Id.*
Scarborough v. Myrick..... 794

Judgments—concluded.

15. Where plaintiff appears and resists defendant's motion to open a judgment under sec. 82, Code, he thereby waives formal notice of the motion. *Id.*

Journal Entries.

16. The judge's memorandum upon his trial docket will not take the place of a formal journal entry of judgment. *Hornick v. Maguire*..... 826
17. A decree preventing the violation of an agreement by which a judgment creditor bound himself to exhaust the property of one judgment debtor before proceeding against that of another, *held* not objectionable as restraining a levy for the collection of costs, but too broad, as not being limited to the case in which the decree was rendered. *Gibson v. McClay* 901

Judicial Notice. See EVIDENCE, 1.

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COURTS, 1. PROHIBITION. RES JUDICATA, 1.

Justice of the Peace. See APPEAL BONDS, 4.

1. A justice of the peace has no jurisdiction to hear and determine an action against an officer for misconduct in office. *Warren v. Sadilek*..... 53
2. It is only from a final judgment that appeal lies. *Denslow v. Dodendorf*..... 328

Landlord and Tenant.

A landlord properly terminated a lease before paying for improvements where he gave to the lessee the notice required by the lease, and tendered in a court of equity payment for improvements in such an amount as upon an accounting should be found due the person entitled to such payment. *Estabrook v. Stevenson*..... 206

Legislature. See CONSTITUTIONAL LAW, 3. STATE TREASURERS, 9.

Letters of Credit.

Construction of letter of credit providing for payment of drafts, until further notice, for the cost or value of stock shipped with or without bill of lading attached. *Burke v. Utah Nat. Bank*..... 247

Libel and Slander. See CONTEMPT, 3.

1. In an action by a girl of sixteen for slander, a ver-

Libel and Slander—concluded.

- dict in her favor for \$1,000, for a charge of incest, was not excessive. *Herzog v. Campbell*..... 370
2. Words imputing an indictable offense are actionable *per se*, and no special damage need be proved. *Id.*

Limitation of Actions.

1. A suit to foreclose a mechanic's lien must be commenced within two years from the date of filing the lien. *Monroe v. Hanson*..... 30
2. An opportunity to amend a petition by offering to redeem mortgaged land was properly denied, where the proof showed that the right to redeem was barred. *Hall v. Hooper*..... 113
3. The statute begins to run against a bill to redeem from the time the mortgagee entered into open and notorious possession of the premises under claim of ownership. *Id.*..... 112
4. The statute runs against a bill to declare a deed absolute in form a mortgage from the time the grantee's possession becomes adverse to grantor's title. *Stall v. Jones*..... 706

Malicious Prosecution.

1. In an action for malicious prosecution plaintiff must allege and prove that defendant's conduct was inspired by malicious motives and that he acted without probable cause. *Rider v. Murphy*..... 857
2. Evidence held insufficient to show malice or want of probable cause on part of one who caused another to be prosecuted for embezzlement. *Id.*
3. Definition of "probable cause." *Id.*
4. The existence of probable cause, the facts being established, is a question of law. *Nehr v. Dobbs*..... 864
5. A presumption of probable cause is established by proof that plaintiff was convicted in the criminal cause, but such a presumption may be rebutted. *Id.*, 863
6. Evidence of probable cause by proof of conviction may be rebutted by showing that the conviction was procured by fraud or perjury, or by proof of any facts showing that the conviction was under circumstances depriving it of any naturally probative effect. *Id.*
7. Where defendant, at the time he began the criminal prosecution, was aware of facts establishing the in-

Malicious Prosecution—concluded.

nocence of plaintiff, a misapprehension of the law, resulting in a conviction, does not create probable cause, though it may affect the issue of malice. *Id.*, 864

8. Petition *held* to plead want of probable cause. *Id.*

Malpractice. See PHYSICIANS AND SURGEONS.

Mandamus.

1. A writ of *mandamus* to compel county officers to pay a judgment against the county is not void because the judgment is void. *Boasen v. State*..... 245
2. Writ of *mandamus* allowed to compel the officers of Red Willow county to remove their offices and records from Indianola to McCook. *State v. Roper*.... 417
3. The duty of railroad companies to construct or repair viaducts as required by a city ordinance may be enforced by *mandamus*. *Chicago, B. & Q. R. Co. v. State* 550
4. A village treasurer may be compelled to pay liquor-license money to the proper school district, though the term for which the license was issued has not expired. *Guthrie v. State*..... 819

Master and Servant.

1. A servant assumes the risk of employment known to him or apparent to persons of his experience and understanding, where he voluntarily enters into it and continues therein without complaint or objection as to the hazards. *Malm v. Thelin*..... 686
2. In a suit for personal injuries, a servant must plead the existence of facts creating an exception to the rule that he assumed the risks of employment. *Id.*
3. The presumption is that the servant assumed the risk of employment, and, in a suit for injuries, the burden is upon him to establish an exception to the rule. *Id.*
4. Evidence tending to show that defective machinery was used under a promise by the master to remedy the defect, *held* inadmissible where such promise had not been pleaded. *Id.*..... 687

Mechanics' Liens.

1. A foreclosure suit must be commenced within two years from the date of filing the lien. *Monroe v. Hanson* 30
2. The mere fact that the owner of land gave his note for a portion of materials for improvements did not

Mechanics' Liens—concluded.

relieve his property from a lien for the entire amount of materials furnished. *Livesey v. Hamilton* 644

3. The right to a lien was not destroyed because the claimant, in taking a note for the amount due, described himself by the fanciful designation of "Western Cornice Works," where no one was misled or injured thereby. *Id.*

Merger.

Where one acquires a greater and a lesser estate, and there is no intermediate estate, the lesser is merged in the greater, but the estates will be kept separate when such is the intention of the parties. *Mathews v. Jones* 616

Misconduct of Attorneys. See TRIAL, 4.**Mistake.**

1. Relief against mistake is generally confined to cases where the minds of the parties never met and to cases where the contract made was not correctly expressed. *Moore v. Scott*..... 346
2. Relief against mistake should not be granted because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment. *Id.*

Money.

"Money" may include not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. *State v. Hill*.. 459

Mortgages. See INSURANCE, 2. LIMITATION OF ACTIONS, 3. PRINCIPAL AND AGENT, 2.*Assignment.*

1. The assignee of notes secured, though the assignment is without consideration, succeeds to mortgagee's right to have redemption made as a condition of canceling the mortgage. *Hall v. Hooper*..... 111

Merger.

2. Case where a conveyance of title from mortgagor to mortgagee, subject to payment of the mortgage by the latter, did not merge the estates. *Mathews v. Jones* 616

Mortgages—concluded.

Innocent Purchasers.

3. One claiming title through a mortgagee who acquired title from the mortgagor under a conveyance subject to the payment of the mortgage, *held* not an innocent purchaser as against a *bona fide* holder of the notes secured by the mortgage, though the mortgagee released the lien of record. *Id.*

Absolute Deeds.

4. Where the grantee under a deed absolute in form, but intended as a mortgage, is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting. *Stall v. Jones*..... 706
5. Plaintiff's evidence in a suit to have a deed absolute in form declared a mortgage should present a state of facts consonant with reason and consistent in its parts. *Id.*

Receivers.

6. In a proper case the court may appoint a receiver to collect the rents and profits, though sec. 55, ch. 73, Comp. Stats., provides that the mortgagor has the legal title and right of possession. *Philadelphia Mortgage & Trust Co. v. Goos*..... 804
7. In a foreclosure proceeding plaintiff is entitled to the appointment of a receiver when it is shown that the mortgaged property is probably insufficient to discharge the debt. *Id.*
8. After confirmation of sale and appeal therefrom, the trial court, when necessary to protect the mortgagee's interests, may appoint a receiver to collect the rents pending the appeal. *Id.*

Payment.

9. One who executes a mortgage to secure a negotiable note is not necessarily entitled to protection as to payments to the mortgagee on the assumption that the latter did not transfer the note. *Bull v. Mitchell* 647
10. Payment of a negotiable note, secured by a mortgage, to an investment company of which the mortgagee was manager, *held* not to bind the transferee of the note, though payments of interest coupons had been previously made to the mortgagee and forwarded to the holder of the note, it being shown that the latter never recognized the mortgagee as agent. *Id.*

Municipal Corporations. See EVIDENCE, 1, 10, 11. **MANDAMUS**, 4. **RAILROAD COMPANIES**, 3, 4.

Liquors.

1. The sale of intoxicating liquors within cities and villages can only be conducted under municipal ordinances duly enacted. *Hornberger v. State*..... 40

Streets. Damages.

2. A city is liable for damage resulting from a material change of the grade of its streets. *City of Harvard v. Crouch*..... 133
3. In a suit against a city for changing the grade of a street the measure of damage is the depreciation in the value of plaintiff's property. *Id.*

Damages.

4. Damage to abutting property by the construction of a viaduct may be shown by evidence that travel was diverted and plaintiff's business injured. *City of Omaha v. McGarock*..... 313

Canal Companies.

5. The canal company contemplated by chapter 71, Session Laws, 1895, is not a municipal corporation. *State v. County Commissioners of Douglas County* 428

Viaducts. Railroads.

6. An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha held valid and binding. *Chicago, B. & Q. R. Co. v. State*..... 550
7. An ordinance requiring two railroad companies to reconstruct specific portions of a viaduct was not void because the city failed to proceed against other companies operating tracks as lessees. *Id.*..... 551

Sidewalks. Damages.

8. The fee of streets is vested in the municipalities, and sidewalks are parts of the streets. *Davis v. City of Omaha*..... 836
9. The law does not make it the duty of a lot owner to build, maintain, or repair the sidewalk in front of his premises. *Id.*
10. A city may license or permit a lot owner to build or repair a sidewalk in front of his premises. *Id.*
11. A general permission to a lot owner to build or repair a sidewalk on his premises continues until revoked by the city. *Id.*

Municipal Corporations—concluded.

12. The duty of a city to keep its streets and sidewalks in a safe condition cannot be devolved upon another so as to relieve the city from liability for a failure to perform such duty. *Id.*
13. A lot owner who was ordered to build a sidewalk in front of his property within a certain time was a trespasser, where he placed obstructions in the street in attempting to comply with the order after the time expired. *Id.*..... 837
14. Where a lot owner, in building for a city, under a license, a walk in front of his property, negligently leaves an obstruction in the street, the city is liable for resulting damages. *Id.*..... 836
15. Negligence on the part of a city must be shown in order to make it liable for damages resulting from obstructions placed in the street by a trespasser. *Id.*

Names. See DEEDS, 9. MECHANICS' LIENS, 3. PARTIES, 4-6.

Negligence. See CARRIERS, 3. INDEMNITY BONDS. RAILROAD COMPANIES, 6.

1. A person is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. *Kitchen v. Carter.*..... 776
2. The question of the proximate cause of an injury is for the jury, but its verdict will be set aside when manifestly wrong. *Id.*
3. The owner of realty has no right to construct a building which, by reason of defects or weakness, is liable to fall and injure adjoining owners or the public. *Id.*
4. The owner of a building, a wall of which fell and killed a fireman who was ascending a ladder supported by the wall, *held*, under the evidence, not liable on the theory that the building was negligently constructed and dangerous. *Id.*
5. The facts from which the inference of negligence arises must be pleaded, conclusions not being sufficient. *Omaha & R. V. R. Co. v. Wright.*..... 886

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. MORTGAGES, 3, 10.

1. Evidence discussed in opinion *held* sufficient to sustain a finding that the purchaser of a note had

Negotiable Instruments—concluded.

- knowledge of usury therein when he bought it as agent for his father who was bound thereby. *Sanders v. Wedeking*..... 73
2. Want of consideration in an action on a note must be specially pleaded, and is not available as a defense under a general denial. *Sharpless v. Giffen*... 146
 3. As between the original parties to the indorsement in blank of a note, the terms of the contract may be established by parol evidence. *Corbett v. Fetzer*, 269
 4. The liability created by the indorsement in blank of a note cannot be varied by parol evidence, as against a subsequent *bona fide* holder. *Id.*
 5. "Without recourse," following the name of the first, and preceding the name of the second indorser of a note, may be shown by parol evidence to apply to the former instead of the latter. *Id.*
 6. Where the only defense to an action by an indorsee is failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred for value before maturity. *Crosby v. Ritchey* 924
 7. Answer *held* to charge a failure of consideration only and not fraud in the inception of the note in suit. *Id.*
 8. Liability of commission merchants under an obligation to accept drafts in pursuance of a letter of credit, where the drafts were made for the cost or value of stock shipped. *Burke v. Utah Nat. Bank*... 247

New Trial. See BILL OF EXCEPTIONS, 4. INSTRUCTIONS,
11. REVIEW, 45.

1. A petition by a plaintiff for a new trial, under sec. 602 of the Code, should be denied, where he did not state a meritorious cause of action in his original petition and failed to allege therein facts sufficient to support a judgment in his favor. *Gilcrest v. Nantker* 58
2. A verdict should not be set aside for error in instructions, where it is manifest that no other verdict should have been returned under the evidence. *State v. Hill*..... 458
3. The finding of a jury should be set aside where there is not sufficient evidence to support it. *Anheuser-Busch Brewing Ass'n v. Murray*..... 627

Newspapers. See CONTEMPT, 3.

Notice. See COMPROMISE AND SETTLEMENT, 5. JUDGMENTS, 15. QUIETING TITLE, 5.

Novation.

The deposit by a treasurer of certificates received by him from his predecessor in the same bank which issued them, the cancellation of the certificates, and the state's acceptance of a credit on open account for the amount thereof, operated as a novation, and made the bank the state's debtor. *State v. Hill*..... 460

Office and Officers. See STATE TREASURERS.

1. A suit against a county treasurer for the costs incurred through the wrongful issuance of a distress warrant after plaintiff's taxes were paid, is an action for misconduct in office. *Warren v. Sadilek*.... 53
2. It is a presumption of law that officers perform their official duties, until the contrary is shown by evidence. *Green v. Barker*..... 935

Opening and Closing. See TRIAL, 2, 3.

Overruled Cases. See TABLE, *ante*, p. xlv.

Parties. See RES JUDICATA, 2.

1. Where plaintiffs in error are not parties to a judgment, or their privies, the petition in error may be dismissed. *Burlington & M. R. R. Co. v. Martin*..... 56
2. Under sec. 29 of the Code, the real party in interest is the person entitled to the avails of the suit. *Kinsella v. Sharp*..... 664
3. Where one lawfully sells his property for a nominal consideration, the purchaser is the real party in interest in a suit for conversion of the property. *Id.*
4. Where a pleading states a cause of action against defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as *descriptio personæ*. *Andres v. Kridler*..... 585
5. It will not be presumed for the purpose of invalidating a judgment that defendant has a Christian name other than the initial by which he was sued. *Scarborough v. Myrick*..... 795
6. Where defendant appears, or is personally served, and fails to object in the trial court to being described in the petition by the initials of his Christian name, the defect is waived. *Id.*

Partnership. See PRINCIPAL AND SURETY, 1.

1. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue at law another partner, on his bond, for a share of money received by the latter who kept the books and failed to charge himself with the receipt of such money. *McAuley v. Cooley*, 165
2. Evidence that two farmers bought a threshing-machine, paid for it with their joint and several notes secured by chattel mortgage, and jointly used it, will not support a finding that the purchasers were partners, but rather warrants the conclusion that they were tenants in common. *State Bank of Lush-ton v. Kelley*..... 678
3. The assets of an insolvent partnership cannot be applied in satisfaction of the personal obligations of the individual partners to the prejudice of firm creditors. *Steele v. Kearney Nat. Bank*..... 724
4. Evidence held to sustain a finding that a chattel mortgage was given to secure an indebtedness of the firm. *Id.*

Passes. See CARRIERS, 1.**Patents.** See PUBLIC LANDS, 1.**Payment.** See COMPROMISE AND SETTLEMENT, 5. MORTGAGES, 10. STATE TREASURERS.

1. Where partial payments have been made on a running account, the debtor may direct their application. *State v. Hill*..... 457
2. Where a debtor fails to direct the application of payment, the creditor may make the application. *Id.*
3. The law will apply partial payments according to their priority of time, where neither party has directed the application. *Id.*

Physicians and Surgeons.

A physician and surgeon impliedly engages that he possesses ordinary knowledge and skill, and that he will, in the course of his employment, exercise such proper care and attention as may reasonably be expected from members of his profession. *Griswold v. Hutchinson*..... 727

Pleading. See BONDS, 2. FRAUD. INDEMNITY BONDS. INSURANCE, 12, 13. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 2. NEGOTIABLE INSTRU-

Pleading—concluded.

MENTS, 2. NEW TRIAL, 1. QUIETING TITLE, 3.
REPLEVIN, 1, 2. REVIEW, 44. SALES, 2. TRESPASS.

1. The allowance of amendments is largely in the discretion of the trial court. *Murray v. Loushman*..... 256
2. A party is not required to prove an averment admitted by a pleading of his adversary. *Johnson v. Reed* 322
3. An allegation in a pleading that the grantor made and executed a deed is a sufficient averment of delivery. *Brown v. Westerfield*..... 399
4. A judgment foreign to the issues joined, and for which there was no prayer, should be reversed upon appeal. *Carter v. Gibson*..... 655

Police Power. See CONSTITUTIONAL LAW, 3-10.

Possession. See VENDOR AND VENDEE, 1.

Practice. See APPEAL BONDS, 4. BILL OF EXCEPTIONS.
DISMISSAL. TRIAL.

- A motion in the supreme court to affirm a judgment below may be sustained where the petition in error presents no question for review. *State Ins. Co. v. Buckstaff* 1

Principal and Agent. See COMPROMISE AND SETTLEMENT,
5. INSURANCE, 16.

1. A principal who ratifies a contract made for him by another must adopt all the instrumentalities employed by such agent to bring it to a consummation. *Hall v. Hooper*..... 111
2. Where a purchaser of land has it conveyed to his wife and executes in his own name a purchase-money mortgage, the wife, by accepting the deed, adopts the mortgage, and the fact that the husband acted without authority in writing is immaterial, as the statute of frauds does not apply to such a case. *Id.*
3. Authority of an agent to do a particular act may be inferred from proof that his principal authorized or ratified similar acts of the agent. *First Nat. Bank of Wilber v. Ridpath*..... 96
4. Agency cannot be proved by the mere declarations of one assuming to act as agent. *Anheuser-Busch Brewing Ass'n v. Murray*..... 627
5. Declarations of one assuming to act as agent, and the fact that he printed upon his delivery wagon,

Principal and Agent—concluded.

- "J. K. Ellis, Agent," *held* insufficient to establish agency. *Id.*..... 629
6. Where one of two innocent persons must suffer through the fraud of the agent of one, that one must suffer who placed the agent in a position to perpetrate the fraud. *Bull v. Mitchell*..... 654

Principal and Surety. See APPEAL BONDS. BONDS, 3.
INDEMNITY BONDS. STATE TREASURERS.

1. Verdict in favor of the sureties on the bond of partners who entered into a contract to erect a public building *held* to be sustained by the evidence in an action for the price of materials, under an issue as to whether the materials were furnished to the contractors or to an individual member of the firm after dissolution of the partnership. *Hickman v. Layne* 177
2. Under a bond for the performance of a contract requiring builders to pay for all labor and material, the sureties are liable to a subcontractor for material furnished by him and used in the building. *Fitzgerald v. McClay*..... 816
3. An increase in the amount of capital invested in the business of a partnership did not release the sureties on a bond for the faithful performance of the duties of a partner. *McAuley v. Cooley*..... 165
4. An increase in the compensation of an insurance agent of three and one-third per cent of the business transacted, with permission to employ solicitors and pay them out of his commissions, did not change the contract so as to release the surety on the agent's bond. *Taylor v. Standard Life & Accident Ins. Co.*..... 673

Prohibition.

- The supreme court has no jurisdiction to award a writ of prohibition as an independent remedy. *State v. Hall* 579

Public Lands.

1. A patent evidencing a grant of land from the United States is not open to collateral attack. *Green v. Barker* 934
2. A deed executed by a trustee holding title from the United States under the Town Site Act is not open to collateral attack. *Id.*

Publications. See CONTEMPT, 3.

Quieting Title. See PLEADING, 3.

1. A person claiming title may maintain an action to quiet it against any one claiming adversely. *Hall v. Hooper* 111
2. An action to quiet title may be maintained by a remainder-man during the continuance of the particular estate. *Id.*
3. A mortgagor, in order to remove from his title the cloud of a sheriff's deed under a void foreclosure, must offer to pay the sum due on the mortgage, and where he seeks such affirmative relief, he must offer to redeem, though the mortgagee's right to foreclose is barred. *Id.*..... 112
4. Petition *held* to state a cause of action. *Scarborough v. Myrick* 794
5. In an action to quiet title service by publication may be made upon a non-resident defendant who cannot be summoned in the state. *Id.*

Railroad Companies. See CARRIERS.

1. Section 48 of the charter of the city of Omaha, authorizing an ordinance requiring railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, is a valid exercise of police power. *Chicago, B. & Q. R Co. v. State*..... 550
2. An ordinance requiring the reconstruction by two companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha *held* not to violate prior contract obligations. *Id.*
3. A city ordinance authorizing the crossing of the streets by the tracks of a railroad company confers upon the latter no exclusive use of the crossings. *Chicago, B. & Q. R Co. v. Steel*..... 741
4. A railroad company exercising an easement in a street is not entitled to compensation from a street railway company as a condition to the crossing of the former's tracks by the latter under a grant of power from the city. *Id.*
5. In a suit against a company for damages resulting from the operation of its railroad near plaintiff's residence, *held*, under the evidence, that the jury was not governed by passion, prejudice, or undue

Railroad Companies—concluded.

means in assessing plaintiff's recovery at a sum so small as \$100. *Beavers v. Missouri P. R. Co.*..... 761

6. Evidence in a suit to recover the value of stock killed on the track of a railroad company held to present a question of negligence for the determination of the jury. *Burlington & M. R. R. Co. v. Gorsuch* 767

7. Where stock are killed or injured through the engineer's failure to keep a lookout, the company is liable, though the animals were not seen until it was too late to avoid striking them. *Omaha & R. V. R. Co. v. Wright*..... 886

Ratification. See PRINCIPAL AND AGENT, 1-3. STATE TREASURERS, 2, 8, 9.

Receipt. See COMPROMISE AND SETTLEMENT, 5.

Receivers. See MORTGAGES, 6-8.

Records. See EVIDENCE, 2, 3, 5, 10, 11.

Recoupment. See SET-OFF AND COUNTER-CLAIM.

Release and Discharge. See ATTORNEY AND CLIENT, 3.

Remittitur.

1. Where a judgment was excessive to the amount of eighteen cents, a remittitur for that sum was required as a condition of affirmance. *Andres v. Kridler* 588
2. Where excess in the amount of recovery is the only error in a record for review, the judgment may be affirmed upon the filing of a remittitur for the proper sum. *Regier v. Shreck*..... 667

Replevin. See SALES, 3.

1. Under a petition alleging general ownership, right of possession and wrongful detention, plaintiff may prove fraud in a previous sale to defendant and a rescission of the sale. *Phenix Iron Works Co. v. McEvony* 228
2. Plaintiff's allegation of general ownership cannot be proved by introducing in evidence a mortgage on the chattels replevied. *Strahle v. First Nat. Bank of Stanton* 319
3. Where plaintiff claims under a chattel mortgage, he must allege a special ownership and plead the facts. *Garber v. Palmer*..... 704

Replevin—concluded.

4. A plaintiff who obtained possession of the property under the writ cannot dismiss the action without defendant's consent. *Id.*..... 699
5. Where a plaintiff who replevied the property fails in his proof or in prosecuting the case, the defendant is entitled to judgment and a trial to establish his damages. *Id.*
6. A judgment against plaintiff for the return of the property or its value should be satisfied of record where he paid the costs of suit and damages for the wrongful detention and tendered the property to defendant. *Manker v. Sine*..... 736

Rescission. See CONTRACTS, 2. SALES, 4, 5. VENDOR AND VENDEE, 2, 3.

Res Judicata.

1. Order of a circuit court of United States denying a deficiency judgment in a foreclosure proceeding, held to involve the merits of the cause. *Tzschuck v. Mead* 260
2. A judgment against an officer for the value of property wrongfully seized under execution is conclusive evidence, in an action on his official bond against the principal and sureties, of plaintiff's ownership at the time of the seizure and of the amount of damages sustained, and the fact that the officer was not designated as sheriff in the former case is immaterial. *Lewis v. Mills*..... 910

Review. See APPEAL BONDS. CRIMINAL LAW. INSTRUCTIONS. INTOXICATING LIQUORS, 1-5. NEW TRIAL. TRIAL, 12.

1. The supreme court will not presume the adjournment of a term of the district court from the fact that twenty-three days have intervened since a given day thereof. *Hyde v. Kent*..... 26
2. In an error proceeding in the district court to review the judgment of an inferior court, a finding of error in the record is sufficient to sustain a judgment of reversal. *Warren v. Sadilek*..... 55
3. Only parties to a judgment, or their privies, can prosecute error or appeal. *Burlington & M. R. R. Co. v. Martin*..... 56
4. An appellant who files a petition in error abandons his remedy by appeal. *Childerson v. Childerson*.... 162

Review—continued.

5. Errors in a criminal prosecution cannot be corrected on *habeas corpus*. *State v. Leidigh*..... 126
6. A party cannot predicate error upon a ruling which he procured to be made. *Norwegian Plow Co. v. Bollman* 186
7. Where an appeal from a justice of the peace was properly dismissed, the dismissal will not be reversed because an untenable reason was assigned for the decision. *Denslow v. Dodendorf*..... 328
8. Proceedings in error may be commenced in the supreme court any time within a year from the rendition of the final order. *Scarborough v. Myrick*..... 794
9. A judgment foreign to the issues, and for which there was no prayer, should be reversed. *Carter v. Gibson* 655
10. A case should be reviewed on the theory upon which it was prosecuted or defended below. *Omaha Breic-ing Ass'n v. Wuethrich*..... 920

Assignments of Error.

11. An assignment that several instructions are erroneous may be overruled where one of them is found to be correct. *Oltmanns v. Findlay*..... 289
Pythian Life Ass'n v. Preston..... 392
12. An assignment that the court erred in admitting in evidence the judgments against defendant may be overruled where a portion of the judgments was properly admitted. *Regler v. Shreck*..... 667
13. The question as to whether there was error in the assessment of the amount of recovery by the jury held not raised by the assignments of error stated in the opinion. *Bearers v. Missouri P. R. Co.*..... 761
14. Assignments as to errors occurring at the trial should set forth some matter for which a motion for a new trial is authorized by the Code. *Id.* .
15. Assignments of error not discussed in the briefs are waived. *Wood v. Gerhold*..... 397
City of Kearney v. Smith..... 408
16. Arguments on questions not raised by proper assignments of error will be disregarded. *Post v. Olmsted* 893
17. An assignment of a petition in error that a particular instruction is erroneous may be disregarded where the instruction was only excepted to and

Review—continued.

assailed below in connection with others properly given. *Bankers Life Ass'n v. Lisco*..... 345

Bill of Exceptions.

18. Assignments of error relating to evidence or rulings thereon will be disregarded in absence of a properly authenticated bill of exceptions. *Felber v. Gooding*.. 39
First Nat. Bank of Greenwood v. Cass County..... 172
Union P. R. Co. v. Kinney..... 393
Wood v. Gerhold..... 397
Andres v. Kridler..... 585
White v. Smith..... 625
McCall v. State..... 660

19. A written stipulation of facts forms no part of a record for review unless made so by a bill of exceptions. *State Ins. Co. v. Buckstaff*..... 1

20. A bill of exceptions cannot, by a stipulation of facts, be made part of the record for review in another case in which the stipulation is filed. *Id.*

21. In absence of a bill of exceptions, it will be presumed that instructions containing correct statements of law proper under the pleadings were applicable to the evidence. *Oltmanns v. Findlay*..... 289

22. In absence of a properly authenticated bill of exceptions, it will be presumed that every essential averment of the petition not negatived by the verdict was proved, and that the instructions refused should not have been given. *Romberg v. Hediger*... 201

23. In a proper case a bill of exceptions may be withdrawn from the supreme court for amendment below. *Macfarland v. West Side Improvement Ass'n*.... 661

Affirmance.

24. The judgment below may be affirmed where the petition in error presents no question for review. *State Ins. Co. v. Buckstaff*..... 1
Wood v. Gerhold..... 397

25. Where special findings are sustained by sufficient evidence, a judgment upon the verdict in accord with the findings may be affirmed. *Sanders v. Wedeking* 71

Evidence.

26. A judgment will not be reversed on account of a difference of opinion between the appellate and trial courts in regard to the weight of evidence. *City of Harvard v. Crouch*..... 133

Review—continued.

27. A judgment supported by sufficient evidence should be affirmed where questions of fact only are presented. *Monroe v. Hanson*..... 30
Martin v. Clarke..... 100
Allsman v. Daley..... 739
Lombard Investment Co. v. Snowden..... 834
28. The judgment should not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Wakefield v. Connor*.... 225
Lundgren v. Crum..... 242
State v. Spirk..... 337
Gallagher v. Wolf..... 589
Nelson v. Mills..... 824
Buffalo County Nat. Bank v. Gilcrest..... 897
Whitcomb v. Thomas..... 909

Discretion of Trial Court.

29. A ruling in respect to leading questions will not be disturbed in absence of an abuse of discretion on part of the trial court. *Baum Iron Co. v. Burg*..... 21
30. In absence of an abuse of discretion, a ruling on motion to amend a pleading is not subject to review in the supreme court. *Murray v. Loushman*..... 256
31. Error does not appear in a ruling on application of a party to withdraw a rest for the purpose of offering further testimony, unless an abuse of discretion is shown. *Omaha Real Estate & Trust Co. v. Kragstow*, 592

Exceptions.

32. An order sustaining a demurrer to a petition is not reviewable unless excepted to, though the action is solely for equitable relief. *Abbott v. Barton*..... 822
33. Error cannot be predicated on the admission of evidence, where ample evidence of the same nature was admitted without objection. *Hickman v. Layne*, 178
34. Alleged misconduct of counsel can only be reviewed where there was an objection to the conduct and a ruling on the objection. *Bankers Life Ass'n v. Lisco*, 341
35. Assignments of error relating to giving or refusing instructions will be disregarded where the rulings were not excepted to below. *City of Kearney v. Smith* 408

Final Orders.

36. It is only from a final judgment that an appeal lies. *Denslow v. Dodendorf*..... 328

Review—continued.

37. An order dissolving a temporary restraining order and denying a temporary injunction is not appealable. *Manning v. Connell*..... 83
38. One cannot appeal from a mere judgment for the costs of suit. *Little v. Gamble*..... 827
39. There must be a final judgment on the merits of a cause before the rulings below can be reviewed. *Barnhouse v. Village of Adams*..... 756
40. A judgment will not be reviewed before it has been formally entered on the journal, a memorandum upon the judge's trial docket not being sufficient. *Hornick v. Maguire*..... 826

Harmless Error.

41. A judgment should not be reversed for harmless error. *Baum Iron Co. v. Burg*..... 21
42. A judgment should not be reversed merely for the admission of irrelevant evidence in a cause tried to the court without a jury. *Storer v. Hough*..... 789

New Trial.

43. A party waives his right to a review of the ruling on motion to make a pleading more specific, by failing to mention the ruling in his motion for a new trial. *Barker v. Davies*..... 78
44. A motion for a new trial is unnecessary to present for review the question whether the petition states a cause of action. *Scarborough v. Myrick*..... 794
45. A motion for a new trial will not be considered in the appellate court unless certified to in the transcript for review. *Romberg v. Fokken*..... 198

Transcripts.

46. The transcript is the exclusive evidence of the proceedings below. *Norwegian Plow Co. v. Bol'man*.... 186
47. A transcript for review imports verity and can only be corrected in the lower court. *Omaha Loan & Trust Co. v. Hogeboom*..... 7
48. Assignments of error based on giving or refusing instructions will be disregarded where the instructions have not been authenticated in the transcript for review. *Burlingim v. Baders*..... 204
49. Instructions omitted from the transcript will not be reviewed. *Callen v. Rose*..... 638
50. An assignment of error based on an order overruling a motion for a continuance will not be consid-

Review—concluded.

error in the record is insufficient to sustain a judgment upon review, where the record fails to show that the motion was passed upon below. *Bush v. State* 642

Roads. See HIGHWAYS.

Robbery.

1. Evidence held sufficient to support a conviction. *Pjarrou v. State*..... 294
2. An instruction submitting to the jury the question as to whether accused, "either alone or in company with others," committed the acts complained of, was held proper under the evidence. *Id.*..... 295

Sales.

1. Instructions were held proper, where they recognized defendant's right to insist upon a strict performance of the contract of sale and permitted the jury to consider whether such performance was waived. *Barker v. Davies*..... 78
2. Proof of a false statement knowingly made by a purchaser who represents that he is possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the seller. *First Nat. Bank of Chadron v. McKinney*..... 149
3. A merchant who was induced to make a sale on credit through the buyer's fraud may rescind the contract and reclaim the goods, or ratify the sale and sue on the contract, but cannot pursue both remedies. *Id.*
4. A seller seeking to rescind a sale for fraud must generally offer to return the purchase money, but need not do so where the purchaser damaged the property to an amount equal to the sum received. *Phenix Iron Works Co. v. McEroney*..... 228
5. One who takes a chattel mortgage to secure a pre-existing debt is not entitled to protection as a bona fide purchaser against an action to rescind a former sale to the mortgagor. *Id.*
6. Except as against creditors, one may sell his property for a nominal consideration. *Kinsella v. Sharp*, 664

Satisfaction. See JUDGMENTS, 12.

School-Land Contracts.

Question whether a school-land contract was forfeited without notice. *State v. Spirk*..... 337

Schools and School Districts.

Moneys arising from a liquor license issued by a village belong to the school district in which the village is situated and must be applied to the support of the common schools in that district. *Guthrie v. State* 819

Set-Off and Counter-Claim.

In an action for conversion a defendant who relies upon his superior title and disclaims any special interest in the property cannot complain in the appellate court on the ground that he should have been permitted to recoup the amount of a lien against the damages for conversion. *Omaha Brewing Ass'n v. Wuethrich*..... 920

Settlement. See COMPROMISE AND SETTLEMENT. STATE TREASURERS, 5.

Sheriffs and Constables. See DAMAGES, 3. RES JUDICATA, 2.

1. Where money paid into court for a party has been wrongfully applied to payment of the fees of an officer for serving process for the other party, it may be recovered in a suit against the officer. *Van Etten v. Coburn*..... 283
2. Where the debtor claims his exemption and files an inventory under sec. 522, Code, it is the duty of the levying officer to call appraisers and release the property if the appraised value is less than \$500. *Daley v. Peters*..... 848

Stare Decisis.

1. Where a line of decisions, though erroneous, has become a rule of property, it should be adhered to until changed by statute. *State v. Hill*..... 459
2. In absence of complications resulting from property rights, courts should modify or overrule decisions fundamentally wrong. *Id.*

State Treasurers.

1. A state treasurer has no right to receive in payment of the public revenues anything but money. *State v. Hill*..... 457
2. The state may ratify the acts of the treasurer in re-

State Treasurers—concluded.

ceiving for revenues payments not made in money, and where it does so he and his sureties are chargeable as for money. *Id.*

3. In an action by the state on the bond of the state treasurer for a failure to turn over money to his successor, the question as to how much actual money had been received and paid was *held* to be for the jury, and a verdict founded on sufficient evidence was allowed to stand. *Id.*..... 456
4. The mere delivery and acceptance of certificates of deposit, upon which no money has been realized, is not such a payment as will release an outgoing treasurer. *Id.*..... 457
5. Where an incoming treasurer is chargeable for payments accepted from his predecessor in certificates of deposit instead of cash, the retiring treasurer is released to the extent of such payment. *Id.*..... 459
6. An incoming treasurer who accepts from his predecessor payment in certificates of deposit instead of cash is chargeable upon his bond for the amount of such payment, though the bank fails before the certificates are paid. *Id.*
7. The method of transacting business by checks, drafts, and certificates of deposit is so far applicable to custodians of public funds as to render them liable for remittances by that means, where such instruments are in good faith tendered and accepted as payment. *Id.*..... 458
8. The legislature has the power to ratify the act of an outgoing treasurer in turning over to his successor, as money, certificates of deposit. *Id.*..... 457
9. It was *held* that the state ratified the act of an outgoing treasurer in turning over to his successor certificates of deposit issued by an insolvent bank, where it was shown that the legislature made an appropriation to reimburse the fund tied up in the bank, and that the state treasurer subsequently sued the receiver of the bank for the sum due on the certificates of deposit. *Id.*..... 519

Statute of Frauds. See PRINCIPAL AND AGENT, 2.

1. A contract is not within the statute of frauds merely because it may, or probably will, not be performed within a year. *Carter White Lead Co. v. Kinlin* 410

Statute of Frauds—concluded.

2. A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. *Id.*

Statutes. See CONSTITUTIONAL LAW. CORPORATIONS, 2. EMBEZZLEMENT, 3. TABLE, *ante*, p. li.

1. The statute providing for the creation of canal companies (Session Laws, 1895, ch. 71), is invalid, the subject of the act not being clearly expressed in the title. *State v. County Commissioners of Douglas County* 429
2. Chapter 71, Session Laws, 1895, providing for the creation of corporations to construct and operate canals, is invalid, being an attempt to amend the general corporation law without a reference to its provisions in the amending act. *Id.*
3. Where two statutes conflict, the later in point of time will prevail. *Omaha Real Estate & Trust Co. v. Kragscow* 592
4. Section 5, ch. 31, Session Laws, 1856, as amended by ch. 12, Session Laws, 1864, being in conflict with sec. 44 of said ch. 31, the latter section was repealed by implication. *Id.*
5. Where one of two sections enacted at the same time on the same subject is amended so as to conflict with the other, the latter is repealed by implication. *Id.*
6. Sections 5 and 41, ch. 43, Rev. Stats., 1866, relating to real estate, were enacted at the same time, and being repugnant to each other, sec. 5 was repealed by sec. 41. *Id.*

Summons. See JUDGMENTS, 5, 13, 14.

1. Plaintiff is not required to set forth his cause of action in his affidavit for publication. *Scarborough v. Myrick* 795
2. An affidavit for publication is sufficient where it shows that defendant is a non-resident, that service cannot be had upon him in the state, and that the action is one of those mentioned in sec. 77 of the Code. *Id.*
3. By filing an answer to the merits and asking to have a decree rendered upon service by publication opened under sec. 82 of the Code, defendant waives all defects and irregularities in the service. *Id.*

Summons—concluded.

4. A defendant who has not appeared may have a decree against him set aside on motion, where the only notice of suit was given by a publication requiring him to answer before the petition had been filed. *Id.*

Supreme Court. See COURTS, 2.

Suretyship. See PRINCIPAL AND SURETY.

Tax Deeds.

- One seeking to enjoin a treasurer from issuing a tax deed on the ground that the tax sale was made in violation of an injunction must prove that the decree allowing the injunction was in force at the time of the tax sale. *Monell v. Ireys*..... 213

Tenants in Common. See PARTNERSHIP, 2.

Transcripts. See REVIEW, 45-49.

Treasurers. See STATE TREASURERS.

Trespass.

- A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, though it prays treble damages and does not charge that the trespass was willful, as required by sec. 636 of the Code. *Lundgren v. Crum*..... 242

Trial. See INSTRUCTIONS.

1. Case where prejudicial error did not result from the fact that the jury took to their room an itemized account which had been introduced in evidence. *Hickman v. Layne*..... 177
2. A party who waives the opening argument does not thereby waive his right to close. *Id.*..... 178
3. The party upon whom rests the burden of proof is entitled to open and close the evidence and argument. *Id.*
4. A party desiring to review proceedings in relation to the misconduct of an attorney should, at the time, object to the conduct and obtain a ruling on the objection. *Bankers Life Ass'n v. Lisco*..... 341
5. An order sustaining a demurrer to a petition will not be reviewed unless excepted to. *Abbott v. Barton*, 822
6. A ruling of the trial court on application of a party to withdraw a rest and introduce further evidence,

Trial—concluded.

should not be reversed except for an abuse of discretion. *Omaha Real Estate & Trust Co. v. Kragseou*, 593

7. A party who has not furnished a copy of a document introduced in evidence should not be permitted to withdraw the document. *Macfarland v. West Side Improvement Ass'n*..... 661
8. The practice of introducing original papers and records in evidence instead of copies should not be encouraged. *Regier v. Shreck* 667
9. The evidence must be confined to the issues tendered by the pleadings. *Callen v. Rose*..... 638
10. A verdict should respond to the issues made by the pleadings. *Cannon v. Smith*..... 917
11. A party by failing to object to a proper question does not waive his right to object to an answer thereto containing inadmissible testimony. *Malm v. Thelin* 686
12. The admissibility of testimony given in an answer to a proper question not objected to may be presented for review by a motion to strike out the answer and an exception to the order overruling the motion. *Id.*
13. In a cause tried to the court without a jury the admission of irrelevant evidence is not reversible error. *Stover v. Hough*..... 789

Trover and Conversion.

1. Evidence held sufficient to sustain a verdict for plaintiff in an action to recover money forcibly taken from her by a creditor of her husband. *Murphy v. Virgin*..... 692
2. Money taken forcibly from the owner may be recovered though he is indebted to the wrong-doer in a sum equal to the amount taken. *Id.*..... 693
3. In a suit against a sheriff for selling property under an execution, without an appraisement, after the debtor claimed his exemptions, the fact that the latter's affidavit contained a false averment is no defense. *Daley v. Peters*..... 848

Usury. See NEGOTIABLE INSTRUMENTS, 1.

Vendor and Vendee. See PRINCIPAL AND AGENT, 2.

1. Possession of realty is notice of a claim of right. *Monroe v. Hanson*..... 30

2. A statement by a vendor that third persons, who represented the land to be tillable, being merely the expression of an opinion, is insufficient to charge the vendor in an action to rescind. *Moore v. Scott*..... 346
3. A vendor who stated that reliable third persons represented the land to be tillable, but that he had no personal knowledge in regard to it, did not thereby adopt the representation, and rescission cannot be had merely because the statement proved false. *Id.*

Viaducts. See RAILROAD COMPANIES, 1, 2.

Witnesses. See TRIAL, 11, 12.

1. The extent to which leading questions may be allowed rests in the discretion of the trial court.
Baum Iron Co. v. Burg..... 21
2. It is not error to instruct a jury that in determining the credit to be given defendant's witnesses their interest in the result of the suit may be considered.
City of Harvard v. Crouch..... 133
3. A witness was permitted to show that she never knowingly subscribed to or made the statements contained in an affidavit introduced in evidence.
Bankers Life Ass'n v. Lisco..... 340
4. A jury is not bound to accept as true all testimony of a witness not directly contradicted or impeached.
Murphey v. Virgin..... 693
5. A party must call the attention of a witness to a statement before proving it to be at variance with the latter's evidence at the trial. *Davison v. Cruse*.. 829

1. "Due." <i>Ryan v. Douglas County</i>	9
2. "Liquidated." <i>Treat v. Price</i>	875
3. "Loan." <i>State v. Hill</i>	458
4. "Money." <i>Id.</i>	459

Writs. See SUMMONS.

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